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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 873.

THE UNITED STATES, APPELLANT,

VS.

THE FIRST NATIONAL BANK OF DETROIT, MINNESOTA.

• No. 874.

THE UNITED STATES, APPELLANT,

VS.

THE NICHOLS-CHISOLM LUMBER COMPANY, THE MINNEAPOLIS TRUST COMPANY, AND HIRAM R. LYON.

No. 875.

THE UNITED STATES, APPELLANT,

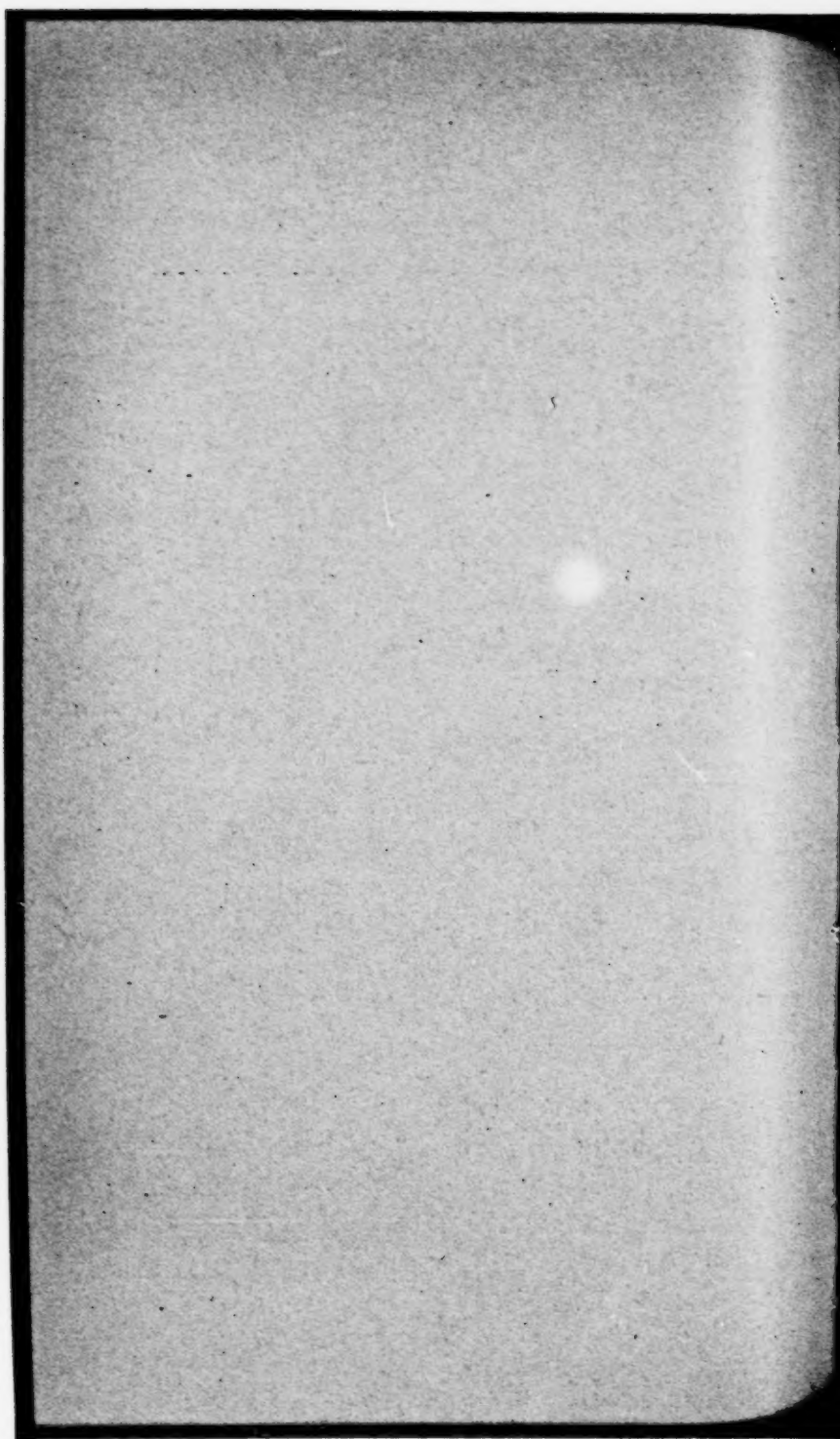
VS.

THE NICHOLS-CHISOLM LUMBER COMPANY, THE MINNEAPOLIS TRUST COMPANY, AND HOVEY C. CLARK.

APPEALS FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.

FILED JANUARY 31, 1914.

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(24025)
(24026)



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Pleas and proceedings in the United States Circuit Court of

Appeals for the Eighth Circuit, at the September term, A. D. 1913, before the honorable Walter H. Sanborn, circuit judge, and the honorable William H. Munger and the honorable Jacob Trieber, district judges.

Attest:

[SEAL.]

JOHN D. JORDAN,

*Clerk of the United States Circuit Court
of Appeals for the Eighth Circuit.*

Be it remembered that heretofore, to wit, on the first day of October, A. D. 1912, a transcript of record pursuant to appeals allowed by the District Court of the United States for the District of Minnesota was filed in the office of the clerk of the United States Circuit Court of Appeals for the Eighth Circuit in certain causes wherein the First National Bank of Detroit, Minnesota, is appellant, and the United States of America is appellee, which said cause was docketed in said Circuit Court of Appeals as No. 3869; wherein the Nichols-Chisolm Lumber Company et al. are appellants and the United States of America is appellee, which said cause was docketed in said Circuit Court of Appeals as No. 3870 and wherein the United States of America is appellant and the Nichols-Chisolm Lumber Company et al. are appellees, which said cause was docketed in said Circuit Court of Appeals as No. 3871, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its clerk, is in the words and figures following, to wit:

1 United States District Court District of Minnesota, Fifth
 Division.

United States of America,

vs.

First National Bank of Detroit, Minnesota,

Sixth Div. No. 356.

Fifth Div. No. 266.

United States of America,

vs.

Nichols-Chisolm Lumber Company, a corporation, Minneapolis
Trust Company, a corporation and Hiram R. Lyon,

Sixth Div. No. 559.

Fifth Div. No. 267.

United States of America,

vs.

Nichols-Chisolm Lumber Company, a corporation, Minneapolis
Trust Company, a corporation and Hovey C. Clark,

Sixth Div. No. 1184.

Fifth Div. No. 268.

Appearances.

Chas. C. Haupt, U. S. District Attorney, St. Paul, Minnesota,
Solicitor for plaintiff, M. C. Burch, Wm. A. Norton,
Gordon Cain, Minneapolis, Minnesota.

R. J. Powell, Minneapolis, Minnesota, Solicitor and Counsel
for defendants.

Pleas In the United States District Court, District of Min-
nesota, Fifth Division, in the above entitled actions.

2 (Stipulation as to Transcript on Appeals.)

United States District Court, District of Minnesota,
Fifth Division.

United States of America, Complainant,

No. 266. vs. In Equity.

First National Bank of Detroit, Minnesota, Defendant.

United States of America, Complainant,

No. 267. vs. In Equity.

Nichols-Chisolm Lumber Company, et al., Defendants.

United States of America, Complainant,
No. 268. vs. In Equity.
Minneapolis Trust Company, et al., Defendants.

It Is Hereby Stipulated and Agreed by and between the parties to the above entitled causes by the respective solicitors and counsel as follows:

That the above named causes were tried together; that except Plaintiff's Exhibit "A" and "B", and Defendant's Exhibit 1, which are to be returned in each case, the same testimony is applicable to all three cases, and was made the basis of decision in each case; that said causes having been appealed to the Circuit Court of Appeals for the Eighth Circuit, the Clerk of the United States District Court above named [—] requested to return the testimony in the case of United States of America vs. First National Bank of Detroit only, except as to the exhibits above mentioned, which are returned
3 in all three cases, to the end that duplication may be obviated and that the record on appeal in said case of United States of America vs. First National Bank of Detroit may be referred to and considered as a part of the above named other two cases to the same extent and as fully as if the testimony was embraced therein. The purpose of this stipulation is the avoidance of unnecessary expense of returning and printing the entire record in each case; that this stipulation may be filed and made a part of the record in each case.

Dated this 27th day of September, 1912.

CHAS. C. HOUPPT,
Solicitor for Plaintiff.

M. C. BURCH,
Counsel for Plaintiff.

R. J. POWELL,
Counsel for defendants.

4

(Order as to Transcript on Appeals.)

Whereas it appears from the stipulation to that effect, duly filed herein, on the 27th day of September, A. D. 1912, that the above entitled causes were tried together; that the same testimony was applicable to all three causes except three certain exhibits, in said stipulation named, and was made the basis of the decision in each cause, and that the said causes have been appealed to the United States Circuit Court of Appeals for the Eighth Circuit.

Now, Therefore, in accordance with the terms and provisions of the said stipulation, it is by the Court—

Ordered, that the clerk of this court in making his transcripts and returns upon said appeals shall include therein only the [testi-] in the case of the United States vs. The First National Bank of Detroit, except plaintiff's Exhibits "A" and "B", and defendants' Exhibit 1, which shall be returned in each
5 of said cases, and that the transcript and record on appeal in the said case of the United States vs. The First National Bank of Detroit may be referred to and considered a part of the other two above named cases to the same extent and as fully as if the testimony was embraced therein.

Dated September 27th, 1912.

PAGE MORRIS,
Judge.

6 (Proceedings in case of United States vs. First National Bank of Detroit, Minnesota, No. 266.)

Præcipe for Transcript.

To the Clerk of Above Named Court:

Please certify to the Clerk of the United States Circuit Court of Appeals, eighth circuit, upon the appeal in the above suit, the bill, answer and replication; stipulation for taking testimony & order upon same; report of master with all exhibits & stipulations relating thereto; the decision of the court, decree, record of your minutes, and all papers filed in said cause subsequent to September 3d 1912.

R. J. POWELL,
Solicitor for defendant.

CHAS. C. HOUP, T,
Solicitor for complainant.

7 (Bill of Complaint in Case No. 266.)

In the Circuit Court of the United States for the District of Minnesota, In Equity.

To the Judges of the Circuit Court of the United States for the District of Minnesota, In Equity.

George W. Wickersham, Attorney General of the United States, for and on behalf of the United States of America, Complainant, herein, brings this Bill of Complaint against the First National Bank of Detroit, Minnesota, a Corporation, Defendant, and thereupon complaining says:

First.

That Defendant is a citizen and resident of the District and State of Minnesota; that it is a corporation organized and existing under the laws of the United States, with its principal place of business at Detroit, Minnesota.

8

Second.

That at all times heretofore since the acquisition of the territory comprised within said State and District by it, said Complainant has been and still is seized and possessed in fee simple of a certain parcel of land described as the West half ($W\frac{1}{2}$) of the southwest quarter ($SW\frac{1}{4}$) of Section Five (5), Township one hundred and forty-one (141) north, Range thirty-nine (39) west of the Fifth Principal Meridian, of the value of Two Thousand Dollars (2000.00), in the County of Becker, within said District of Minnesota, as a part of its public domain, and has at all times heretofore exercised and still does exercise through the proper department of its Government sovereign power and authority over said lands and control of the management and disposition of the same.

9

Third.

That during all the period hereinbefore in paragraph Second of this Bill mentioned, the Complainant has sought as a sovereign guardian to protect the interest of and assist certain Indians known as the Chippewa tribe or nation, and for such purpose during such period set apart as a reservation from its public domain and, for the time being, has devoted to the occupancy and use of what is known as the White Earth band of said nation or tribe certain townships of land, including the one herein described, within which the particular parcel of land, also hereinbefore described, is situated, and of which said parcel comprises a part; that later, through its Congress, Complainant provided for what is known as allotments in severalty of portions of land within said reservation to the respective Indians or said band, and particularly said described parcel; that without in any wise parting from its title in fee simple and its said ownership and control of said land, the Congress of Complainant enacted sundry statutes with provisions whereby respective parcels of land embraced within said reservation should be segregated from others and set apart in severalty from the whole tract so reserved for the use and occupancy of the Indians respectively belonging to said band of said tribe and living upon said reservation to whom respectively such parcels respectively should be allotted in order to obviate the complexities and difficulties attendant upon a communal pos-

session and occupancy of the whole of said reservation by said band; that in each and every instance, including that of the said parcel such allotment in severalty did not amount at law or in equity more than to a license without consideration to the Complainant from the respective allottees for whose benefit such parcels were set aside with the right to go in and upon and occupy and enjoy for an indeterminate period without waste the respective parcels of land so set aside to each, including that hereinbefore described; that such rights were personal ones as to the said allottees as such licensees of Complainant, and were not attended by any incident, quality or character which would permit of their being assigned or transferred by such allottees by means of any manner of leases, grants, deeds or other conveyances to any other person or persons whomsoever because of such allotments being a matter of pure privilege by and through the grace of Complainant.

Fourth.

Your Orator shows that on May 18, 1905, application was made to Complainant through its proper officers duly entrusted and charged with such affairs, by O-bah-baum, or Rose Ellis, an Indian of said tribe or band, for such an allotment embracing said described parcel of land; that on September 13, 1907, the same was duly approved by said officers, and that what is known as a trust patent was on February 6, 1908, executed to said Indian by which the allotment of said described parcel of land to her became complete; and Complainant shows in connection with the proceedings last above mentioned, and particularly with said trust patent, that it merely promised therein, without consideration, to preserve said parcel described to said Indian for a period of years in trust for her sole and only use and benefit, with a provision that thereafter after twenty-five years (25) from the execution of said trust patent the same might be, at the discretion of the President of the United States, at some time conveyed to her, said allottee, in fee simple.

Fifth.

Your Orator further shows that by the courtesy and grace of Complainant, but without having given any consideration therefor, said allottee had by such trust patent accorded to [her] a right to the personal use and occupancy of said allotted parcel of land as a home for herself during the period of twenty-five (25) years, as hereinbefore stated, and might, at the end of said period, have been granted a patent in fee simple to said parcel of land, but did not have, either at law or in equity, any right, title or interest, claim or de-

mand, upon, in, or to said parcel of land which she could assign, alienate, or in any manner convey or have conveyed for her by any other person as a legal representative in her name, place and stead, or in, by, or under or through the order of any court or person claiming to act as the officer of any court to any other person or persons whomsoever against the right and title of Complainant hereinbefore in this Bill asserted, but your Orator shows that said Indian mistook her rights and privileges as allottee and grantee in said so-called trust patent and, assuming that said allotment and said trust patent were equal, or at least similar to the ownership and possession of a person having a title in fee simple, sought to encumber said parcel of land as will hereinafter more fully appear:

That on July 17, 1908, the said O-bah-baum, or Rose Ellis, and George Ellis, her husband, executed to said Defendant, the First National Bank of Detroit, Minnesota, a so-called mortgage covering the said described parcel of land, for an alleged consideration of sixty dollars (\$60) which said mortgage was on July 17, 1908, filed in the office of the Register of Deeds for Becker County and thereafter recorded in mortgage book 30 at page 256:

And your Orator further shows that the only person or corporation at present pretending to have a right or interest in and to said parcel of land hereinbefore described as against the Complainant herein is the Defendant hereinbefore named in this Bill of Complaint.

12

Sixth.

And your Orator avers that neither by the allotment mentioned and herein described, nor by the so-called trust patent, nor in any other manner, did the said allottee acquire from Complainant any vested rights to said land assignable or transferable by her or by anybody else for her to any other person or persons, partnership, corporation or other party whomsoever or whatsoever, or any title whatever by which she or her legal representatives could divest or could deed, mortgage or otherwise convey or alien the same, and that any assumption or pretension of authority or power over said land by or an account of Complainant's said allotment—or trust deed—to said allottee, by any person or officer whomsoever save a properly constituted and authorized officer of this Complainant thereto, was and is without authority of law or foundation in equity, and that every and all conveyances, liens, taxes or other claims asserted or pretended as against said land, are wholly void and ineffectual and have at all times been so, and ought not to be recognized or tolerated by this Court, and that any mortgage,

discharge of mortgage, deed, or any proceeding or paper connected therewith, respecting said parcel—in any manner is an invasion of and interference with the sovereign rights of Complainant in the premises and constitutes a cloud upon the title of Complainant's property in said parcel of land and directly tends to deteriorate the same in value and impedes its full and unrestricted control and possession of and supervision over said land and ought in equity and by the decree of the Judges of this Court to be removed and the title to Complainant be quieted.

Seventh.

And your Orator further shows that said lands are not improved and occupied as in the case of ordinary farms, but are in the main open and unoccupied, but that Complainant is in such occupancy as is presumed at law and in equity from absolute ownership and the right to use at all times in accordance with its sovereign pleasure and especially as against any pretended rights that can be asserted and maintained by said Defendant, and your Orator especially avers that the interests of Complainant as such owner, as well as Guardian of the Indians of said White Earth band of the Chippewa tribe, entitled it, Complainant, to the free, unrestricted and complete occupancy of said parcel, and the defendant, or any party or parties whatsoever, claiming the right to such occupancy in, by, under, or through said Defendant, should by Order and Decree of this Court be perpetually restrained from interfering with such Complainant's right.

14 Forasmuch, therefore, as the Complainant is remediless in the premises at and by the strict rules of the Common law and is only relievable in a Court of Equity where matters of this kind are properly cognizable and relievable; and to the end that Complainant may have that relief to which it is entitled and that the Defendant herein named may answer the premises, but not on oath or affirmation, such manner of answer being hereby expressly waived, your Orator prays:

That the so-called mortgage hereinbefore set forth and found of record, covering the parcel of land hereinbefore described, be set aside and held for naught as being a cloud upon the title of Complainant thereto, and that Complainant be left in the peaceable and undisturbed possession thereof by the Order and Decree of this Honorable Court.

15 And that Complainant may have from this Honorable Court such other and further relief in the premises as the circumstances may seem to require and as shall be found agreeable to equity and good conscience.

May it please your Honors to grant unto the Complainant the right of subpoena to be issued out of and under the seal of this Honorable Court directed to the said Defendant First National Bank of Detroit, Minnesota, commanding it to appear in this Court on a day certain therein to be named and then and there stand to and abide by such order, Judgment and Decree herein as to your Honors shall seem meet and proper; and your Orator will ever pray.

(Signed) GEORGE W. WICKERSHAM,
Attorney General of the United States.

CHARLES C. HOUP,
United States Attorney for the District of
Minnesota and Solicitor for Complainant.

Marsden C. Burch
Eugene H. Long
Arthur M. Seekell
Wm. A. Norton
Of Counsel.

16

(Answer.)

The Answer of the First National Bank of Detroit, Minnesota, the defendant above named, to the Bill of Complaint of George W. Wickersham, Attorney General of the United States, for and in behalf of the United States of America, Complainant.

This defendant now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception, or otherwise, that can or may be had or taken to the many errors, uncertainties and other imperfections in the said Bill contained, for Answer thereto, or to so much and such parts thereof as this defendant is advised it is material or necessary for it to make answer unto, answering, says:

1st: This defendant admits that it is a resident of the District and State of Minnesota; that it is a corporation organized and existing under the laws of the United States, with its principal place of business at Detroit, Minnesota, as in said Bill of Complaint set forth.

17 2nd: This defendant denies all of the allegations set forth in the second paragraph in said Bill, and on the contrary this defendant alleges that the Complainant herein has not been in possession of the lands described in said second paragraph of said Bill of Complaint in any manner for more than thirty years last past, nor has the said Complainant been seized or possessed of said parcel of land in fee simple, or other

wise, since the ratification of the Treaty entered into by and between said Complainant and the Mississippi Bands of Chippewa Indians on the 19th day of March, 1867, and the said parcel of land is not now, and for more than thirty years last past has not been any part of the public domain, nor has the Complainant herein any right, title or interest in or to the same.

3rd: This defendant denies each and every allegation, matter and thing in the third paragraph of said Bill of Complaint contained, as the same is therein set forth, and on the contrary this defendant alleges that the territory comprised within what is known as the White Earth Reservation, in the state of Minnesota, was originally a portion of the territory over which the Indians of the Chippewa Nation exercised dominion, and that it continued to be a part of the Indian country and exclusively under the dominion, use and occupancy of the Chippewa Nation of Indians until it was ceded to the United States of America by certain Treaties entered into between the Government of the said United States and said Chippewa Indians in the year 1865, and prior years. By the said several Treaties entered into between the Chippewa Indians and the United States of America, there were reserved for the Mississippi Bands of said Chippewa Indians, certain lands and territory situated in the state and district of Minnesota, which lands were, by said Treaties, fully and completely confirmed and established as the property of said Indians. That thereafter and on March 19th, 1867, a Treaty was entered into between the Complainant herein and the Mississippi Bands of Chippewa Indians, wherein and whereby the said Complainant, United States of America, in consideration of the relinquishment and transfer to the said

18 Complainant of the Reservations theretofore set apart and conveyed to said Indians, did then and there convey, transfer and set over unto said Bands of Indians all of the territory comprised within the limits of the White Earth Reservation, and did thereafter duly proclaim and confirm the said Treaty. Pursuant thereto the Indians of the Mississippi Bands of Chippewas entered upon and took up their residence within the boundaries of said White Earth Reservation, and ever since said time the White Earth Reservation has been occupied, used and enjoyed by the said Mississippi Bands of Chippewas as their homes, and the said Indians have ever since said period, and are now in the exclusive use and enjoyment thereof. This defendant admits that the United States of America has passed Sundry laws relating to the government of Indian tribes and affairs, and has thereby provided for the taking of allotments in severalty by individual Indians upon said several Reservations, and particularly to the taking of allotments by Indians resid-

ing upon the White Earth Reservation, and has from time to time provided methods whereby Indians might sever their tribal relations and take a portion of the tribal property in severalty, and this defendant admits that in accordance with such laws and regulations, many of the Indians belonging to the Mississippi Bands of Chippewas in the state of Minnesota, and residing upon the White Earth Reservation, have selected portions of their lands as allotments in severalty, and have to that extent complied with and recognized said several acts, laws and regulations of Congress relating thereto, but this defendant denies that the granting of such allotments by the Complainant has been an act of grace, or that the Indians so selecting the same have obtained such allotments, without consideration, and on the contrary alleges that the property so selected by the Indians in severalty was at all times since the adoption of the Treaty of 1867, hereinbefore referred to, the sole property of said several bands of Indians jointly, of which the Indians selecting such allotments were members, and

19 that upon the selection of such allotments the Indians in each and every case acquired a full and complete title in fee simple, any and all provisions in the acts and regulations of Congress to the contrary notwithstanding.

4th: This defendant admits that the lands described in the Bill of Complaint herein were selected by O-bah-baum or Rose Ellis as in the Bill of Complaint set forth, and that the same was approved and a trust patent issued as therein alleged, but this defendant denies [m] that said trust patent was without consideration, or that the same was of any greater or other force and effect than a recognition of said selection in severalty by said Indian, of property which she previously owned in common as a member of said band.

5th: Further answering, this defendant at all times denying the title or interest of the Complainant in said premises, and denying that the allottee of said parcel of land acquired the same merely by the grace and courtesy of Complainant, and had no other or greater interest therein than a mere license to use the same, admits that the instruments described in the fifth paragraph of the Bill of Complaint were executed and recorded.

6th: This defendant denies that the conveyance by said allottee, and said several conveyances described in the Bill, are void, or of no effect, or that the same are in any manner an invasion of, or interference with the sovereign rights of the Complainant in the premises, or that the same, or any of them, constitute a cloud upon the title of Complainant's property in said parcel of land, and denies that the Complainant has any right

whatever to the control or possession thereof, or supervision over the same. This defendant denies that the lands described in said Bill of Complaint are in the main vacant and unoccupied.

20 7th: Further answering, this defendant alleges and avers that the said O-bah-baum or Rose Ellis, mentioned in the Bill of Complaint herein, and who selected as her allotment in severalty the premises therein described, is a mixed-blood Chippewa Indian, and not an Indian of the full-blood, and that she is one of the class of Indians referred to in the act of Congress relating to the Chippewa Indians on the White Earth Reservation, in the state of Minnesota, approved June 21, 1906, and the further act of Congress relating thereto, approved March 1, 1907, and that by virtue of said acts of Congress said allottee, described and referred to in the Bill of Complaint, is and was wholly emancipated and removed from the pretended control or supervision of the Complainant, United States of America, and was thereby fully authorized and empowered to manage her own affairs and control and dispose of her own property, including the allotment in question, to the same extent and with the same force and effect as though she had been a full citizen of the United States and state of Minnesota, and a person wholly of the white blood. This defendant further alleges in that behalf that the premises in controversy were conveyed by mortgage by the said allottee to the defendant for a full and fair consideration, and that at the time of the execution of said conveyance by said allottee and her husband, said allottee made oath to the fact that she was a mixed-blood Chippewa Indian, and of the class mentioned in said several acts of Congress, and the defendant, in accepting said conveyance, was advised of that fact, and had no knowledge or information to the contrary, nor means of readily ascertaining the true facts with relation thereto, and did in all things fully rely upon the affidavit and representations made by said allottee at the time of the execution of [his] said conveyance, and did accept said conveyance in good faith, fully believing that the said allottee had full right and authority under said several acts of Congress to convey said property. That the allottee has not returned the consideration received for her conveyance, nor offered to return the same, nor to place the parties in any manner in statu quo, nor has the Complainant, in its assumed role of pretended Guardian of said Indian, or Indians, offered or attempted in any manner to refund the payment so made to the allottee, pursuant to her said representations, or to in any manner secure such refundment, or protect this defendant from loss by reason of the acts complained of.

21

22 Wherefore, This defendant having fully answered, confessed, traversed and avoided or denied all of the matters in the said Bill of Complaint material to be answered, according to its best knowledge and belief, humbly prays this honorable court to enter its judgment that this defendant be hence dismissed, with its reasonable costs and charges in this behalf most wrongfully sustained, and for such other and further relief in the premises as to this honorable court may seem meet and in accordance with equity.

R. J. POWELL,

Solicitor for Defendant named 312-14 Lumber
Exchange Bldg. Minneapolis, Minn.

23 (Stipulation for Appointment of Examiner and Taking
of Testimony, Etc.)

And now comes the said Complainant by Charles C. Houtt, United States Attorney for said District, and Solicitor herein, and the undersigned of counsel for Complainant, and R. J. Powell, Solicitor for said Defendant, and of counsel, and hereby stipulate and agree for and in behalf of the said parties respectively,—

First: That the evidence in this suit shall be taken orally and without giving the usual formal notice to that effect provided for in Equity Rule No. 67.

Second: That by authority and with the consent of the Court, or Judge at Chambers, such testimony shall be taken before an examiner to be specially appointed by said Court or Judge at chambers; said examiner to be a skillful stenographer, and the testimony so taken stenographically shall be by such examiner put into typewriting.

The testimony of each witness after such reduction to writing shall be deemed and treated as the official testimony and evidence in the case without being signed by the respective witnesses or the examiner in their stead.

Third: Any written stipulation between solicitors or counsel of the respective parties as to any matter or thing being deemed as true or to be considered by the Court as evidence in the cause may be filed with such examiner and returned by him as evidence in the cause, to be treated and considered by the Court the same as though taken by such examiner in the regular way; and no charge shall be made for such filing and return of such written stipulation, except for noting the same in the record and for such copies as may be requested by either party.

24 Fourth: That the Order of the Court, or Judge at chambers, appointing such special examiner shall only empower such examiner to take such testimony, depositions, etc., and extend such portions thereof that are not in writing, and report the whole thereof to the Court to be used upon the trial of the cause.

Fifth: The evidence so taken shall, unless the time shall be extended by agreement between the solicitors and counsel for the respective parties, or by Order of Court, be as follows:

The Complainant's evidence, in chief, shall be adduced and completed within sixty days from the date of the Order of this Court, to be based upon this stipulation; the evidence for the Defendant shall be adduced and completed within ninety days from the expiration of the aforesaid sixty days, or the conclusion of Complainant's proofs; the evidence, if any, offered by Complainant in rebuttal shall be adduced and completed within ninety days from the expiration of the time above allotted to the Defendant, or the conclusion of the proofs of Defendant.

Sixth: When the evidence is so taken and reduced to type-writing, either party may procure a copy, or copies, of all such evidence, or such portions thereof as may be desired, upon such terms as may be agreed upon with the examiner; and publication of the testimony may pass into the Clerk's office upon the mere filing of the examiner's return, without formal notice or order.

CHARLES C. HOUPPT,
Solicitor for Complainant.

M. C. BURCH,
Of Counsel for Complainant.

R. J. POWELL,
Solicitor for Defendant.

25 (Order Appointing Special Examiner, Etc.)

On reading and filing the annexed stipulation, and it appearing by the files and records that this cause is at issue, and on motion of Charles C. Houpt, Solicitor for Complainant, and R. J. Powell, Solicitor for Defendant, that the court appoint some qualified person within said district to act as examiner of this Court to take orally such depositions, evidence and testimony as the parties hereto desire to be taken, in accordance with the rules of practice and the terms of said stipulation, at such suitable place or places within

said district as may be designated by the solicitors or counsel of the respective parties from time to time,

It is therefore ordered that such testimony shall be taken before an examiner, to be hereinafter named, and the testimony so taken stenographically by him shall be put into typewriting; that the testimony of each witness after such reduction to writing shall be deemed and treated as the official testimony and evidence in the case without being signed by the respective witnesses, or the examiner in their stead; that any written stipulation between solicitors or counsel of the respective parties as to any matter or thing being deemed as true, or to be considered by the Court as evidence in the cause, may be filed with such examiner and returned by him as evidence in the cause, to be treated and considered by the Court the same as though taken by such examiner in the regular way, and no charge shall be made by such examiner for filing and return of such written stipulation, except for 26 noting the same in the record, and for such copies as may be requested by either party; that such examiner shall, after taking such testimony, depositions, etc., extend such portions thereof as are not in writing, and then report the whole thereof to the Court, to be used upon the trial of the cause; that the evidence so taken shall, unless the time shall be extended by agreement between the solicitors or counsel for the respective parties, or by order of the Court, be as follows:

Complainants evidence, in chief, shall be adduced and completed within sixty days from the date of this order; that the evidence for the Defendant shall be adduced and completed within ninety days from and after the expiration of the aforesaid sixty days, or the conclusion of the proofs of Complainant; that the evidence, if any, offered by Complainant in rebuttal, shall be adduced and completed within ninety days from the expiration of the time above allotted to the Defendant, or the conclusion of the proofs of Defendant.

When the evidence is so taken and reduced to typewriting, either party may procure a copy or copies, of all, or such portions thereof as may be desired, upon such terms as may be agreed upon with the examiner, and no formal publication of the testimony is necessary; and

It is further ordered that Mr. J. J. Cameron, of Bemidji, Minnesota, be and he is hereby appointed a Special Examiner of this Court, with power and authority to take and transmit to this Court such evidence, depositions and testimony in this cause as the parties hereto desire to be taken, at such places within this district and at such times as may suit the convenience of said Examiner and the parties hereto, conforming, how-

ever, as nearly as practicable, to the times hereinbefore named for such taking; and that said Examiner extend such portions thereof as are not in writing, and then report the whole
27 thereof, with all convenient speed, to this Court, said testimony, when so taken, to be used upon the trial of this cause.

PAGE MORRIS, Judge.

Dated this 26th day of June, 1912.

28 (Report of Special Examiner.)

The above entitled cause was regularly brought on for the taking of testimony, before J. J. Cameron, Esquire, Special Examiner, pursuant to the order of the Court heretofore made herein, on the 24th day of June, A. D., 1912, at 512 Federal Building, Minneapolis, Minnesota; Charles C. Haupt, Esquire, United States District Attorney, and Messrs. W. A. Norton and Gordon Cain, appeared on behalf of the Government, and R. J. Powell, Esquire, of Minneapolis, Minnesota, appeared on behalf of the defendants.

Whereupon, the Government offered in evidence Government's Exhibit "A", which was received in evidence without objection, except as to materiality, competency and so forth, but not as to the manner of establishing the Government's case.

Whereupon, the Government offered in evidence Government's Exhibit "B", which was received in evidence without objection, it being conceded that it is a true copy of the Trust Patent named in the Bill of Complaint as having been issued to the allottee therein named.

Whereupon, the Government rested its case.

29 For the Defense.

Whereupon, Defendants' Exhibit "1" was offered and received in evidence without objection.

Whereupon, the Defendants rested their case.

30 (Certificate of Special Examiner.)

I, J. J. Cameron, Special Examiner, appointed by the Court to take and report to the Court the proceedings and evidence offered in the above entitled action, do hereby certify that under and by virtue of such order I did, on the 24th day of

June, A. D., 1912, take in shorthand all the proceedings had before me, and I do hereby report same to the Court.

Dated June 27th, 1912.

J. J. CAMERON,
Special Examiner.

31 (Government's Exhibit A, Stipulation as to Certain Facts.)

It is hereby stipulated and agreed by and between the respective parties to the above entitled cause, through their respective solicitors and counsel, that the following facts are deemed to be true for the purposes of the trial and decision of this cause:

First: That the land involved in this cause and described in the bill of complaint is situated within, and comprises a part of what is denominated and known as the White Earth Reservation in the State of Minnesota.

Second: That O-bah-baum (Rose Ellis) referred to in the bill of complaint as the allottee, an Indian, then belonging to, and a member of the Mississippi Chippewa tribe or band of Indians and residing with them on the White Earth Reservation, exercising rights and privileges as such member, drawing annuities, etc., selected in allotment the land described in the bill of complaint; that such selection was duly approved by the proper officers of the Government, and afterwards, to-wit, on February 6, 1908, what is commonly known as a trust patent was duly issued to said Indian, claimed to be pursuant to Section 5 of the Act of Congress approved February 8, 1887 (24 Stats., L. 338):

32 That on, to-wit, July 17, 1908, the said O-bah-baum (or Rose Ellis) and George Ellis, her husband, executed to the First National Bank of Detroit, Minnesota, defendant herein, a so-called Mortgage covering the land described in the bill of complaint, for an alleged consideration of sixty dollars (\$60.00), which said mortgage was on, to-wit, July 17, 1908, filed in the office of the Register of Deeds for Becker County, Minnesota, and thereafter recorded in Mortgage book 36 on page 256:

That no subsequent, or other transfer or encumbrance appeared of record at the time of the filing of the bill of complaint, at which time a notice of Lis Pendens was duly filed.

CHARLES C. HOUP,
Solicitor for Plaintiff.

M. C. BURCH,
Counsel for Plaintiff.

R. J. POWELL,
Solicitor for Defendant.

.....
Counsel for Defendant

33 (Government's Exhibit B, Trust Patent issued to
O-bah-baum or Rose Ellis.)

The United States of America, to all to whom these Presents shall come, —Greeting:

Whereas, There has been deposited in the General Land Office of the United States a schedule of allotments approved by the Secretary of the Interior September 13, 1907, whereby it appears that O-bah-baum or Rose Ellis, an Indian of the Otter Tail Pillager Chippewa tribe or band has been allotted the following described land: the west half of the south-west quarter of section five, in township one hundred and forty-one north of range thirty-nine west of the Fifth Principal Meridian, in Minnesota,

Now Know Ye, that the United States of America, in consideration of the premises, has allotted, and by these presents does allot, unto the said O-bah-baum or Rose Ellis, the land above described, and hereby declares that it does and will hold the land thus allotted (subject to all statutory provisions and restrictions) for the period of twenty-five years, in trust for the sole use and benefit of the said O-bah-baum or Rose Ellis or in case of her decease, for the sole use of her heirs, according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or her heirs, as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: Provided, That the President of the United States may, in his discretion, extend the said period.

In Testimony Whereof, I, Theodore Roosevelt, President of the United States of America, have caused these Letters to be made Patent and the Seal of the General Land Office to be hereunto affixed.

Given under my hand at the City of Washington, this sixth day of February, in the year of our Lord one thousand nine hundred and eight, and of the Independence of the United States the one hundred and thirty-second.

34

By the President:

THEODORE ROOSEVELT,

By M. W. Young, Secretary.

H. W. SANFORD,

Recorder of the General Land Office.

Recorded Vol., p.

35 (Defendant's Exhibit 1, Stipulation as to certain Facts.)

Come now the parties to the above entitled action, by their respective Solicitors and Counsel, and for the purpose of this case only, stipulate and agree that the facts hereinafter stated shall be deemed established and sustained by proper evidence, subject however to the objections and exceptions hereinafter [notes]; provided however, and it is expressly so agreed that the facts herein are agreed upon for the purpose of this case only, and that the determination and agreement upon the facts in this case shall not be held or permitted to determine or influence the determination of questions of fact in any other similar case or cases between the United States and the same or other parties, and to that end the facts deemed to be established herein are as follows:

1: That the allottee named in the Bill of Complaint, and to whom the premises in controversy were assigned by an instrument known and described as a Trust Patent, was at the time of the conveyance mentioned in the Bill of Complaint, an adult Chippewa Indian, residing upon the White Earth Reservation. That said allottee, it is agreed, had and has some white blood, derived from a remote white ancestor, the exact amount whereof is and was undetermined, but in that behalf it is agreed that it did not exceed one thirty second.

36 2: That the consideration for the mortgage described in the Bill of Complaint was the full sum of sixty dollars named therein, and to secure the payment of which the said

mortgage was given, it being understood and agreed that this fact is agreed upon subject to the objection on the part of the plaintiff that it is irrelevant and immaterial.

3. That at the time of the execution of the said conveyance the allottee represented and made oath to the fact that she was a mixed-blood Chippewa Indian, and the defendant made the loan and accepted the conveyance in reliance upon the said oath and representations of the allottee, without knowledge or information as to the truth or falsity of such representations, and without means of ascertaining the true facts with relation thereto, all of the foregoing facts being agreed upon at this time subject to the objection on the part of the plaintiff that each and every one of said facts are immaterial and irrelevant to the issues in said cause.

4. That the allottee has not returned the consideration received for her conveyance, nor offered to return the same, nor to place the parties in any manner in statu quo, nor has the Complainant offered or attempted in any manner to refund, or secure the refundment of the payment so made to the allottee, or protect this defendant in any manner, all of which facts are agreed upon subject to the objection on the part of the plaintiff that each and every one of said facts are irrelevant and immaterial in this case.

5: It is Further Stipulated and Agreed by and between the parties hereto, through their respective solicitors and counsel, that under the Treaty of September 30, 1854, between the United States and the Chippewa Indians of Lake Superior and the Mississippi, commonly known and referred to as the

37 "LaPointe Treaty," a provision was made for mixed-bloods among the Chippewa Indians, and that in the administration of Indian Affairs under said Treaty a question as to the construction of the term "mixed-blood" arose and was referred by the Indian Agent at Detroit, Michigan, to the Commissioner of Indian Affairs for an opinion. That thereupon and in response to such request, the Commissioner of Indian Affairs rendered an opinion in the form of the following letter:

"Department of the Interior, Office of Indian Affairs,

June 15, 1855.

Sir:

I have to acknowledge the receipt of your letter of the 9th instant, relating to reservations of land for the Chippewa Indians, under the treaty of September last, and making certain

inquiries regarding the construction proper to be placed upon the seventh subdivision of the second article of that treaty.

In reply to your inquiries, I answer affirmatively the three first stated by you, that, as 'each head of a family or single person over twenty one years of age' is entitled, females over twenty one being single persons, as well as widows, heads of families, come within the treaty provision; and that the term 'mixed-bloods' has been construed to mean all who are identified as having a mixture of Indian and white blood.

The particular proportion of each blood is, therefore, immaterial, where the provision is so broad as that stated in the treaty.

As regards your fourth or last inquiry, whether claimants should be required to furnish evidence of their right before you enter their names, I have to state that you should enter all names that you shall be satisfied from proper care and inquiry are mixed-bloods according to the construction above named. But, as a precautionary measure, and to guard as well the rights of the Indians as the Government, you should submit the list, when completed, for the revision of the general council of the Indians, and strike off or add to the names on such list in accordance with the facts therein ascertained. The Indians themselves, in council, by their own traditions and knowledge, will doubtless greatly aid in arriving at the facts regarding the ancestry of those who may claim under the provisions for mixed-bloods.

Care should be taken to note opposite each name who the person is, as to parentage or genealogy. This course will produce a record that will facilitate the action of this office in the settlement of all cases that may hereafter occur wherein questions of heirship arise, and be generally servicable to the Department.

Very respectfully your obedient servant,

GEO. W. MANYPENNY,
Commissioner.

Henry C. Gilbert, Esq.
Indian Agent, Detroit, Mich."

it being understood and agreed that these facts are agreed upon subject to the objection on the part of the plaintiff that they are irrelevant and immaterial.

38 6: It Is Further Stipulated that in the administration of the Bureau of Indian Affairs relating to the Chippewa Indians on the White Earth Reservation under the Act of

June 21, 1906, and the Act of March 1st, 1907, commonly known and referred to as the "Clapp Act," and particularly with reference to the issuance of fee patents to Chippewa Indians on the White Earth Reservation, applying therefor, on the ground that they (the said Indians) were "mixed-bloods," the Department has not required any statement to be submitted showing the quantum of foreign blood, but has issued such fee patents upon the showing that the applicant was a mixed-blood, it being understood and agreed that these facts are agreed upon subject to the objection on the part of the plaintiff that they are irrelevant and immaterial.

CHARLES C. HOUPt,
Solicitor for Complainant,

WM. A. NORTON,
Counsel for Complainant,

R. J. POWELL,
Solicitor for Defendant.

39 (Order Transferring Cause from Sixth to Fifth Division of the District of Minnesota.)

In accordance with the annexed stipulation, it is by the Court ordered, that this cause be and the same hereby is removed and transferred from the Sixth Division of this District, where the same is now pending to the Fifth Division thereof for trial and all subsequent proceedings, and

It is further ordered, that the Clerk of this Court be, and he hereby is, directed to forthwith transmit all the files and records in said cause to the Fifth Division in this District, except the order for removal in accordance with the rules of practice of this Court, and

It is further ordered, that said cause be heard before the above named Court in the Fifth Division of this District.

Dated June 26-1912.

PAGE MORRIS, Judge.

40 (Testimony Taken Before Special Examiner on Reference.)

The above entitled cause was regularly brought on for the taking of additional testimony, before J. J. Cameron, Esquire, Special Examiner, pursuant to the order of the court heretofore made herein, on the 22nd day of August, A. D., 1912, at Detroit, Minnesota; Charles C. Houpt, Esquire, United States District Attorney, and Messrs. W. A. Norton and Gordon

Cain, appeared on behalf of the Government, and R. J. Powell, Esquire, appeared on behalf of the defendant.

Whereupon the following proceedings were had:

(Testimony for Defendant.)

GEORGE D. HAMILTON, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Examination

By Mr. Powell:

Q. You reside in this city, Mr. Hamilton?

A. Yes, sir.

Q. How long have you resided here?

A. Since 1878.

Q. During all of that time did you reside in what is now the City of Detroit? A. Yes, sir.

Q. What has been your business during that period, Mr. Hamilton?

A. I have been publisher of the Detroit "Record".

Q. During all of that period?

41 A. Yes, sir, until last October.

Q. How extensive has your acquaintance been throughout this section of the State, and particularly that portion of it around the White Earth Reservation?

A. I have had a general acquaintance throughout this country and the White Earth Reservation during all of that time.

Q. Do you remember the passage of the Act removing the restrictions on the White Earth Reservation, to which we are in the habit of referring to as the "Clapp Act"?

A. Yes, sir.

Q. That, I believe, was in 1906?

A. June, 1906.

Q. Since that time have you yourself dealt in any way in lands upon the White Earth Reservation?

A. Yes, sir.

Q. How soon after the passage of the Act did you commence to purchase?

A. [It] once; that is, within a few days after its passage.

Q. At that time, or at any time soon after that period, did you have any conversations with Mr. Michelet, who was then the Indian Agent, with regard to who were and who were not mixed-bloods on the Reservation?

Mr. Norton: The question is objected to as incompetent, irrelevant and immaterial.

The Court:

A. Yes, sir, I had frequent talks with Mr. Michelet regarding that matter.

Q. Those conversations were directed with reference, Mr. Hamilton, to the question of the construction of the term as to what would constitute a mixed-blood; is that true?

Mr. Norton: I now make the further objection, that the form of the question is wrong. To give the conversation would be the only proper way of getting what was said; I object to the question on the further ground that it is leading.

42 The Court:

A. Yes, sir.

Q. Please state, in general terms, as near as you can recall, the substance of those conversations touching the question of the construction of the term "mixed-blood," Mr. Hamilton?

Mr. Norton: I now renew my former objection.

The Court:

A. I could not give the conversation, but I talked with Mr. Michelet many times regarding that question, and the impression that I always had from him, and the information that I had from him, was that any White Earth resident or allottee who had any white blood was a mixed-blood and would come under the terms of the Clapp Act.

Mr. Norton: I ask that he give the conversation, and not state conclusions and impressions.

The Court:

Q. Are you familiar, Mr. Hamilton, with the general understanding of the people around the White Earth Reservation, the business men and others who are engaged in dealing with the White Earth lands, as to the meaning of the term "mixed-blood" in that Act?

Mr. Norton: Objected to as incompetent, irrelevant and immaterial.

The Court:

A. Yes, sir.

Q. You have heard the subject discussed among people generally during the period since the passage of the Act?

Mr. Norton: The same objection.

The Court:

A. Many times.

Q. What is, and was, during all of that period, the understanding of the people engaged in dealing in White

43 Earth lands around the reservation as to the meaning of that term?

Mr. Norton: The same objection.

The Court:

A. It was, that any person having any quantity of white blood was a mixed-blood.

Q. Lands on the White Earth Reservation, Mr. Hamilton, have been bought and sold quite extensively, have they not, since the passage of the Clapp Act? A. Yes, sir.

Q. Can you state whether or not any considerable quantity of those lands which were purchased originally from the Indians had passed to other persons and conveyed more than once?

Mr. Norton: The same objection.

The Court:

A. Yes, sir, they have been.

Q. Can you state whether any of those lands have been sold extensively to persons outside of the State of Minnesota?

Mr. Norton: The same objection.

The Court:

A. Yes, sir, they have been.

Mr. Powell: To save the record, it may be understood that all of this may be taken subject to your general objection.

Mr. Norton: Very well, that will be satisfactory.

Cross-Examination

By Mr. Norton:

Q. Do you mean, Mr. Witness, that it was generally understood that if an Indian had a substantial amount of white blood in his veins, that he was a mixed-blood?

A. Yes, sir.

Mr. Norton: I think that is all.

Redirect Examination

By Mr. Powell:

44 Q. What do you mean by a "substantial amount of white blood," Mr. Hamilton?

A. Why, any amount.

Q. Any amount that can be shown?

A. Why, any amount that can be shown.

Recross Examination

By Mr. Norton:

Q. You are a white man, absolutely?

A. Yes, sir.

Q. You are defendant in many lawsuits where this question is involved, are you not, brought by the Government, to set aside patents to lands? A. No, sir.

Q. You are defendant in some, are you not?

A. I don't think that I am defendant in any case, personally.

Q. Aren't you named as defendant in some?

A. It may be that I am in one. I think I am in one or two; I don't think that I am to exceed that.

Q. Isn't it also a fact that you are interested indirectly, because you had purchased of the allottee in many instances, and then sold to other parties? A. No, sir.

Q. Is that not true, in many instances?

A. That may be true in one or two instances, but not in "many instances".

Q. Well, a few instances?

A. I think one or two; I don't think to exceed two, that I am interested in, that I am named as defendant.

Q. When you sold lands you obtained from the allottee, did you give a quitclaim deed or a warranty deed?

A. A warranty deed.

Mr. Norton: That is all.

Witness excused.

45 JOHN K. WEST, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Examination

By Mr. Powell:

Q. You reside here in this city, Mr. West? A. Yes, sir.

Q. How long have you resided here?

A. Since July, 1881.

Q. In what business are you engaged?

A. In the land business, real estate.

Q. Have you been engaged in that line of business ever since you came to Detroit? A. Yes, sir.

Q. How extensive is your acquaintance throughout the county and the surrounding territory, and particularly that territory surrounding the White Earth Reservation?

A. Why, I have sold land all through this territory for thirty years.

Q. Are you pretty generally acquainted with the business men around the White Earth Reservation? A. Yes, sir.

Q. And various towns along the "Soo" Line?

A. Why, for the last few years I have not been as active in the business as I used to be; but I have been generally acquainted.

Q. You are acquainted with the business men in the city who are engaged in that line of business? A. Yes, sir.

Q. Have you any other business enterprises at the present time besides the land business? A. Yes, sir.

Q. What is it? A. The ice business.

Q. I believe you are also Commodore of the transportation lines down the lakes here, are you not? A. Yes, sir.

Q. You were here during all of the period since the passage of the so-called "Clapp Act", in June, 1906? A. Yes, sir.

Q. Removing the restrictions from the mixed-bloods on the White Earth Reservation? A. Yes, sir.

Q. Have you dealt at all in White Earth lands since the passage of that Act? A. No, sir.

46 Q. Not at all? A. No, sir.

Q. Have you, in connection with your business, and as a citizen of the City of Detroit, observed the general view or understanding of the people of Detroit touching the meaning or construction of the term "mixed-blood", as used in the Clapp Act as to what are or are not mixed-bloods? A. Yes, sir.

Q. State what that general knowledge or general impression or understanding of the term is and was during that period?

Mr. Norton: Objected to as incompetent, irrelevant and immaterial, and upon the further ground that no proper foundation has been laid for the admission of testimony as to such knowledge.

The Court:

A. The general impression seems to have been that any Indian who had white blood in his veins was a mixed-blood.

Cross-Examination.

Mr. Norton: I now ask that the answer be stricken out, it showing on its face that the former objection was well taken.

The Court:

Q. Do you mean by that, that where an Indian had a substantial amount of white blood in his veins he was deemed to be a mixed blood?

A. Why, I have always supposed that where he had any amount of white blood in his veins he was a mixed-blood.

Q. Well, it would be a substantial amount, would it not?

A. Why, I presume it would.

Q. I understood you to say, Mr. Witness, that you have not dealt in Indian titles at all; is that right?

A. No, sir, I have not.

Q. O little bit afraid of them, were you?

A. Why, I was busy with other things. I had troubles enough without.

47 Q. And you might get into trouble, you thought, if you dealt with the Indians?

A. I never gave the matter any great amount of thought.

Q. But, any way, you thought it wasn't a good scheme to go in on?

A. Well, it was that others commenced dealing in lands. I had a large list of lands, and I have sold them since, outside of the Reservation.

Q. And the question was much agitated and talked here, was it not, as to whether or not dealing in Indian lands would be a safe proposition?

A. Well, there was some question, yes sir.

Q. Wasn't there considerable talk and agitation about that?

A. I think there was.

Q. And wasn't the question much discussed as to whether or not it was a hazard?

A. I can't tell you how much it was discussed, I am sure, but it was considerable.

Q. You found it was being discussed? A. Yes, sir.

Redirect Examination

By Mr. Powell:

Q. When you state that the Indians must have a substantial amount of white blood, what do you mean exactly by that? Do you mean such an amount as can be established or proven? Counsel, in asking that question, used the term "a substantial amount". Now, what do you understand by that?

A. Well, I suppose that any amount of white blood in an Indian would class him as a mixed-blood.

Recross Examination

By Mr. Norton:

Q. But you were never interested as to whether or not that was a correct presumption, were you? A. No, sir.

Q. You are a white man, absolutely? A. Yes, sir.

Witness excused.

48 Afternoon Session, August 22nd, 1912.

J. A. NICHOLS, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Powell:

Q. At present, I believe, Mr. Nichols, you reside at Frazee, in Becker County? A. Yes, sir.

Q. That is about twelve or fourteen miles East of Detroit?

A. About ten or eleven miles?

Q. How long have you lived at Frazee?

A. A little over five years; five years last June.

Q. Where did you live prior to that time?

A. I lived at Little Falls, Morrison County, Minnesota.

Q. How long had you lived in Little Falls before you moved to Frazee?

A. I had lived in Little Falls, and in Morrison County, near Little Falls, something over thirty years, I believe; about thirty years.

Q. What is your business at the present time?

A. Lumber manufacturer.

Q. How long have you been in the lumber business?

A. Well, practically all my lifetime, or since I have been able to do any work.

Q. In what branches of the lumber business have you been engaged?

A. Well, most all departments. I started in as swamper, and did all kinds of woods-work, cruising, surveying, estimating, buying and selling lands and logs, and manufacturing same.

Q. Do you remember when the Act of Congress, to which we are in the habit of referring as the "Clapp Act", removing the restrictions from certain Indians on the White Earth Reservation, was passed? A. Yes, sir.

Q. That was, I believe, in the summer of 1906?

A. Yes.

Q. At that time, were you engaged in the lumber business in the vicinity of the White Earth Reservation?

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A. Yes, sir.

Q. With what organization?

A. With the Commonwealth Lumber Company, or Nichols-Chisolm, I wouldn't be sure which; with Nichols-Chisolm Lumber Company.

Q. What position did you occupy with the Nichols-Chisolm Lumber Company? A. I think I was president.

Q. Coming back to the time of the Clapp Act. What, if anything, did your company do, or did you do, in behalf of your company, after the passage of the Clapp Act, in regard to purchasing timber from the Indians on the White Earth Reservation?

A. Well, the first thing we did in regard to purchasing, we made contracts with the Indians on the Reservation, the mixed-blood Indians.

Q. In a general way, Mr. Nichols, how much timber did your company purchase upon the White Earth Reservation?

A. I think about 150 million feet, under this Act.

Q. Since the passage of this Act?

A. Yes, sir, since the passage of this Act.

Q. And your investment in that timber, in round figures, was about what?

Mr. Norton: Objected to as immaterial and irrelevant.

The Court:

A. About a million and a quarter dollars; a little over a million and a quarter dollars.

Q. The Clapp Act removes the restrictions, by its terms, from the adult mixed-blood Chippewa Indians on the White Earth Reservation. What, if anything, did you do, when you first decided to purchase or deal in that class of property, toward ascertaining what the term "mixed-blood" referred to, what class of Indians is referred to?

Mr. Norton: Objected to as incompetent, irrelevant and immaterial.

50 The Court:

A. Well, I was living at Little Falls at that time, and I didn't understand the Act very well—I didn't know whether we had a right to contract for timber, or not, at that time. I consulted the firm of Lindberg & Blanchard, in Little Falls—Mr. Lindberg was the member of the firm that I talked with, took it up with, as he was the only one in the office. I asked him if we had the right—

Mr. Norton: This may all go in under my objection?

Mr. Powell: Yes.

The Court:

Q. Go ahead, Mr. Nichols?

A. I asked Mr. Lindberg if we had the right to buy timber from the allottees on the White Earth Reservation without laying ourselves liable for any damages, or anything, and he told me to come back and he would give me a reply. The next day I went to his office, and he said, "You have a right to contract, as you have told me you intended doing, with mixed-bloods on the White Earth Reservation;" and I asked him, Who constituted the mixed-bloods on the White Earth Reservation, and he told me, "Anyone who had any blood other than Indian blood and had an allotment on the Reservation, and was an adult."

Q. The firm of Lindberg & Blanchard was a firm of attorneys at Little Falls? A. Yes, sir.

Q. Did you consult anyone else?

A. I consulted several attorneys, different attorneys, before I did anything. I consulted attorney H. B. Fryberger, of Duluth.

Q. Did you consult the Agent, do you recall?

A. I can't remember of ever consulting the Agent in regard to it.

Q. Pursuant to that consultation, and your general plan, you then proceeded to make contracts and buy the timber on the reservation from those shown to be mixed-bloods, 51 whom you believed to be mixed-bloods?

A. Yes, sir, I did. I also consulted the firm of Merrill & Powell, of Minneapolis, who told me I had the right to contract and buy timber from the mixed-bloods on the Reservation, and they also informed me that (anyone) having any blood other than Indian blood was a mixed-blood. They told me the only thing was to be careful and not buy from mixed-bloods—from full-bloods. I also talked with attorney Clapp. I don't remember what his name is. He is an attorney in St. Paul. You know him, I presume.

Q. N. H. Clapp?

A. Yes, sir. I talked with him in your presence, and he gave me the same permission.

Q. Did you, during the period after the passage of the Clapp Act, and down to the past year or so, since this controversy arose, discuss the question as to what was included in the term "mixed-blood" with other persons around the Reservation here, in Detroit and elsewhere?

Mr. Norton: This is all received under the same objection?

Mr. Powell: Yes, sir.

The Court:

A. Yes, sir, I did.

Q. Did you ascertain from those discussions what the general understanding of the people in the vicinity of the Reservation was with reference to the meaning of that term?

A. I did.

Mr. Norton: I wish to make the same objection, and the additional objection that conversations should be given and not conclusions.

The Court:

Q. What was, during that period, that general understanding or construction of the people generally around the Reservation with reference to the meaning of that term?

Mr. Norton: The same objection.

52 The Court:

A. Why, the understanding was, among everybody that I talked with, that anybody that wasn't a full-blood was a mixed-blood.

Q. Just what do you mean by that, Mr. Nichols?

A. Why, I mean that anybody that had any blood other than Indian blood was a mixed-blood, and that we would have the right to buy the land or timber.

Q. As I understand it, in all of your dealings with these Indians and the purchase of this large amount of timber you have mentioned, you acted upon that understanding and construction of the term?

Mr. Norton: The same objection, and the additional objection.

The Court:

A. We did.

Cross-Examination

By Mr. Norton:

Q. Mr. Nichols, you referred to the Clapp Act, or rather my brother Powell did. Did you know of the pendency of that Act, in Congress, before it was actually passed?

A. I presume I heard it discussed.

Q. Well, did you know that such an Act was in contemplation? A. Why, I have an idea I did.

Q. Well, don't you know that you did?

A. I think so; I think I heard it talked of frequently.

Q. And you had in mind, that if that Act passed, you might deal under it, did you not?

A. I presume so; I think so, yes.

Q. And you understood, did you, that the Clapp Act, so-called, emancipated the Indians that came within the emancipating clause of the Act? A. Yes, sir.

Q. And that the emancipating provisions of that Act were, as to full-bloods, those that were found to be mentally
53 competent to the satisfaction of the Secretary of the Interior? A. Yes, sir.

Q. But, as to mixed-bloods, they were deemed to be competent because they were mixed-bloods? A. Yes, sir.

Q. Well, now, Mr. Nichols, it was a mooted question in your mind, was it not, as to how much white blood it would take to make a mixed-blood of the Indian?

A. Well, before I investigated?

Q. Yes; I mean, before you investigated?

A. I never gave it a thought at the time, that I know of.

Q. How did you come to investigate it, if you never gave it a thought?

A. Before I paid out any money, I wanted to know what I was doing it for.

Q. Before you paid out any money. But, you did have in mind the question of how much white blood or other blood it would take to make an Indian a mixed blood?

A. I don't know that it ever occurred to me.

Q. It occurred to you sufficiently, so that you went and made inquiry many, many times, of many, many people, did you not? A. After the Act was passed, yes, sir.

Q. That is what I meant. After the Act was passed, and after you undertook to operate upon it, it was a question in your mind, was it not, as to just who had been emancipated by that Act, under the term "mixed-blood"?

A. I don't know that it ever occurred to me. I had no idea that an Act of that kind would be passed.

Q. I mean, after the passage of the Act. The Act has already passed. Is it not a fact that after the Act was passed and before you had ventured to operate under it, you had in mind that you had better make inquiry as to what constituted a mixed-blood? A. Yes, sir.

Q. And that question was as to how much white blood it would take, or other blood than Indian, to make a mixed-
54 blood Indian; is that not right?

A. Yes, sir, that is right.

Q. Lest it might transpire that a mere drop, so to speak,—a mere trace,—a slight trace,—a one, sixty-fourth—might possibly not constitute a mixed-blood under the purview of the Clapp Act; is that true?

A. Now, just let me digest that a minute, before I answer that, please.

Q. Sure?

A. Now, I wasn't sufficiently versed on the Clapp Act, or the provisions of it, to know, in any way, who we had a right to contract and buy timber from, under that Act, until I had consulted attorneys.

Q. Yes, sir. You knew enough to know that you didn't know; is that right? A. Exactly.

One of the things you didn't know was, Whether a mere white blood, be it ever so slight, might not constitute

a mixed-blood under the purview of the Clapp Act; wasn't that one of the things that occurred to you?

A. That didn't occur to me. I didn't know we had a right to contract with anybody on the White Earth Reservation until I had consulted an attorney.

Q. I understood you to say, in your direct-examination, that you inquired specifically? A. I did.

Q. As to what constituted a mixed-blood?

A. I did.

Q. What question was there in your mind about that?

A. Well, I didn't know how much it took to make a mixed-blood, or what that covered, what the Clapp Act covered.

Q. Now, you have answered my question. In other words, the term "mixed-blood" used in the Clapp Act was a term you felt you had better inquire about, to see how much white blood it took to make a mixed-blood; is not that right?

A. Sure.

Q. Then, before you asked of a lawyer, and these other people you have spoken of, you didn't know—you were not satisfied, at least in your own mind, but what an Indian could have a little white blood, and yet not be a mixed-blood, under the purview of the Clapp Act?

A. I didn't know who had a right to sell timber on the Reservation, no, sir.

Q. Then, he could have a little white blood and still not be a mixed-blood; is that right?

A. I say, that didn't occur to me.

Q. It was because of that, that you inquired of these attorneys?

A. I didn't know who I had a right to buy from. I say, that didn't occur to me, a drop, or half a drop, or anything of the kind; that never occurred to me.

Q. But it did occur to you that you didn't know what a mixed-blood was?

A. I did know what a mixed-blood was, sure.

Q. But you asked? A. Sure.

Q. Then, why on earth did you ask?

A. I asked, because I wanted to know who we had a right to buy from on the White Earth Reservation.

Q. Then you didn't ask because you knew?

A. I wanted to know who had a right to sell on the Reservation.

Q. Haven't you already sworn that you asked what constituted a mixed-blood? A. Yes.

Q. Then, you didn't know?

A. I didn't know how much it took to make a mixed-blood, to sell timber, but I knew what a mixed-blood was.

Q. You didn't know how much blood it took to make a mixed-blood sufficiently to give him the right to sell under the Clapp Act; is that right?

A. Yes, sir, that is right.

Q. Then, after you had talked with the first man that you named—and who was he, by the way?

A. He was of the firm of Lindberg & Blanchard. Mr. Lindberg, of Little Falls, was the first man I asked up there.

Q. Were they your regular attorneys?

A. They had done what business I had to do.

Q. They had acted as your attorney before?

A. Yes, sir.

56 Q. And even he was in doubt, when you asked him, wasn't he, and took the matter under advisement, and looked it up, and you dropped in to find out the next day; is that right? A. Yes, sir, that is right.

Q. And, off-hand, he wasn't able to tell you what constituted a mixed-blood, was he?

A. I presume not; because he didn't.

Q. He took time to look it up? A. Yes, sir.

Q. And, after looking it up, he gave you the advice that a mixed-blood was anybody that had other blood than Indian blood? A. Yes, sir.

Q. Now, did you think, Mr. Nichols, in all seriousness, when he told you that, that he meant, no matter how little that other blood might be in proportion to the Indian blood—that, if it was a one-millionth—did you think that was what he meant by his answer?

A. Well, now, I didn't consider it down as small as that.

Q. Did you consider it down as small as a one, one hundred and twenty-eighth?

A. I don't know that I did.

Q. Did you consider it down as small as a one, sixty-fourth? A. I didn't go into that at all.

Q. Did you figure it down as small as a one, thirty-second? A. Well, I presume I did, yes.

Q. How did you come to figure on that, and didn't figure on the rest?

A. I didn't figure on it at all; I knew what made a mixed-blood; I knew a one-thirty-second made a mixed-blood.

Q. You knew that certain? A. Yes, sir.

Q. Before you asked the lawyer? A. Yes, sir.

Q. You always knew that? A. Yes, sir.

Q. Then, you were inquiring of a lawyer, so to speak, to see whether a lesser amount would constitute a mixed-blood?

A. No, sir. I was inquiring of the lawyer to find out the amount that would give me the right to deal with them

57 in this transaction.

Q. You say you knew, when you went to him, that a one, thirty-second would be enough?

A. No, I didn't say that.

Q. Then, you hadn't concluded that a one, thirty-second would be enough before you saw your lawyer? A. No, sir.

Q. Had you concluded that one-sixteenth would be enough?

A. I hadn't concluded anything; I didn't know whether I had a right to buy from anybody or not, before I went to see a lawyer.

Q. You are involving other elements. I am talking about mixed-blood alone. You say, before you went to see your lawyer, you knew a one, thirty-second would make a mixed-blood; is that right? A. Yes, sir.

Q. But you didn't know whether a one, sixty-fourth would; is that right?

A. I didn't say whether I did or not; I hadn't considered it.

Q. Had you really considered even that one-thirty-second would make a mixed-blood? A. No, sir.

Q. Had you considered a sixteenth?

A. I knew it would constitute a mixed-blood.

Q. Had you considered it?

A. I don't say I considered it; I knew it.

Q. How much did you know it took to make a mixed-blood, before you asked the lawyer about it?

A. How much did I know?

Q. Yes, sir; under the purview of the Clapp Act, before having your lawyer's opinion?

A. I knew anybody that had other blood than Indian blood was a mixed-blood.

Q. You knew that before you asked your lawyer?

A. Yes, sir.

Q. Then, why in Heaven's name did you ask the lawyer?

A. I went to the lawyer to see who had a right to sell under the Clapp Act.

Q. You involve other elements, and that seems to be
58 your way of ducking on that question. You have already said, Mr. Nichols, that you went to your lawyer to ask him, among other things, what constituted a mixed-blood?

A. I did; and who had a right to sell their timber.

Q. Now, I am leaving that out. One of the questions that you asked was, What constitutes a mixed-blood under the purview of the Clapp Act? A. Yes, sir.

Q. You have already told me that when you first asked him that, he took it under advisement until the next day?

A. Let me make a statement.

Q. No. I want to get it my way. Isn't it a fact that you went to your lawyer and asked him, among other things, what constituted a mixed-blood under the purview of the Clapp Act?

A. Yes, sir.

Q. And he was not able to answer you off-hand?

A. Yes, sir.

Q. And took it under advisement until the next day, and then informed you that any quantity would be sufficient; is that right? A. Yes, sir.

Q. Well, then, you didn't know when you went there, did you, to your own satisfaction what constituted a mixed-blood?

A. I didn't act on my own knowledge at all; I didn't pretend to.

Q. You thought it unsafe to act, in your own case, on what you thought constituted a mixed-blood? A. Yes, sir.

Q. So you didn't act on your own case, did you?

A. No, sir.

Q. After getting the answer you did from the lawyer, did you consider that he meant that a one-millionth of white blood would be sufficient to constitute a mixed-blood?

A. No, I hardly think I did.

Q. And you didn't think a one-[sixth]-fourth would, either, did you? A. Well, I hardly think I did, no.

Q. You didn't know about any of it until you asked him, did you?

A. No, he didn't tell me whether a sixty-fourth, or one, 59 one-hundredth, or anything. He said, "Anybody having blood other than Indian blood" was a mixed-blood.

Q. Didn't you understand, from that, that any Indian that had an appreciable—substantial—amount of white or other blood than Indian blood was required, to constitute a mixed-blood?

A. I understood from that, that anybody that could show conclusively or satisfactorily that he was a mixed-blood; that had other blood other than Indian, was a mixed-blood.

Q. Yes, but by "other blood", you don't mean that he would be so denominated, if he simply had a one-millionth, would you?

A. I would consider it where there was a certainty. When you got down to a "one-millionth", it would be pretty hard to tell; I wouldn't consider it.

Q. It would be just as hard to tell if it was a one, one-hundred and twenty-eighth, wouldn't it?

A. Well, it would be pretty hard, yes, sir.

Q. It would be about equally as hard if it was a one, thirty-second? A. No, sir, it would not.

Q. What is that?

A. No, sir; it would not be equally as hard to tell, whether it was a one, thirty-second, or whether a one, one-hundred and twenty-eighth, because it is a good ways back, a one, one hundred and twenty-eighth, a good deal more uncertain.

Q. A thirty-second is quite a way back? A. Yes, sir.

Q. And a sixteenth is quite a ways back. It is back to the great-great-grandfather then, isn't it?

A. I presume it is. But it is not very hard to trace back to the great-great-grandfather.

Q. Did you understand that the Clapp Act was undertaking to emancipate the full-bloods that proved to be sufficiently intelligent in the mind or estimation of the Secretary of the Interior, and that that was granted them simply because
60 they were so found to be sufficiently intelligent to do business.

A. Yes, sir.

Q. And, didn't you understand that, so far as the mixed-bloods were concerned they were only allowed to sell, or be emancipated from the restrictions of sale, because, being mixed-bloods, they were better equipped, intelligently, to cope with the white man?

A. No, sir, I didn't. I knew that there were a good many full-bloods on the Reservation that were just as competent as many of the mixed-bloods.

Q. Even though they were half-breeds?

A. Yes, sir.

Q. In other words, you knew there were intelligent half-breeds?

A. I knew there were plenty of fullbloods, I say, that were fully as capable to handle their own property as many of the mixed-bloods were.

Q. And you thought the Secretary of the Interior might find that such were really competent, didn't you?

A. Yes, sir.

Q. Now, you also understood that the Clapp Act was intended to emancipate the mixed-bloods because they were sufficiently intelligent to cope with the white men, or to do business with their property?

A. That was the understanding, yes, sir. My understanding was that they were practically raising the restrictions on the Indians on the White Earth Reservation.

Q. Good, bad and indifferent?

A. That is the way the Clapp Act looked to me.

Q. That, after the Clapp Act passed, the restrictions were removed from practically all the Indians on the White Earth Reservation? A. No, sir.

Q. And you started in to do business with that notion?

A. I say, the intention of the Clapp Act was to raise the restrictions on the White Earth Reservation.

Q. Entirely?

A. Yes, sir; of everybody that was a mixed-blood, and all the full-bloods that were competent.

61 Q. You don't mean that the Clapp Act was passed with the view to removing the restrictions from everybody on the White Earth Reservation? A. Entirely?

Q. Yes? A. No, sir.

Q. Except they were sufficiently intelligent to transact their own business?

A. The full-bloods and mixed-bloods?

Q. Both?

A. My understanding was, that it raised the restrictions wholly on the mixed-bloods. Now, I knew they didn't know whether all the mixed-bloods were competent to handle their own business or not.

Q. In other words, Congress sort of put one over herself on that?

A. That might be; I don't know how it was.

Q. How long had you been watching the Clapp Act proceedings before it actually passed?

A. I hadn't been watching.

Q. You knew it was pending? A. Yes, sir.

Q. You considered acting on it after it passed?

A. I knew the Clapp Act passed, of course. I knew I would probably buy some of the property.

Q. You had that in mind? A. I presume I did.

Q. Did you know the terms of it, as it was drawn, before it was actually passed? A. I did not.

Q. Did you ever hear it discussed?

A. Why, I think I have heard it talked of.

Q. Did you take part in the discussions?

A. I did not.

Q. Did you listen with a view to ascertaining whether or not there was a probability that such Act might be passed as would permit you to deal with the timber on the White Earth Reservation? A. I don't remember that I did.

Q. Will you say that you didn't?

A. Well, I can't remember.

Q. To refresh your recollection, isn't it a fact that you had arrangements made in your mind that you would take advantage of—I don't mean an improper advantage, now.

62 Mr. Nichols—but, that you would take advantage of that privilege and deal for timber on the White Earth Reservation, if such an Act passed?

A. Why, certainly; we expected to buy timber, if such an Act passed.

Q. You had your eye on that timber, among others, didn't you?

A. I presume we did. We had no definite knowledge of that timber; we had never made an estimate of it.

Q. You went after it good and hard after the Clapp Act passed? A. Yes, sir.

Q. Got it as fast as you could get it?

A. Yes, sir.

Q. You employed agents to get it for you?

A. Yes, sir.

Q. Among others, Gus H. Beaulieu? A. Yes, sir.

Q. And Mr. Benjamin L. Fairbanks? A. Yes, sir.

Q. And Robert G. Beaulieu, the brother of Gus H. Beaulieu? A. Yes, sir.

Q. They acted as your agents in getting this timber?

A. Yes, sir.

Q. Did you instruct them that you had been informed by attorneys and others that any amount of other blood than Indian blood was sufficient to constitute a mixed-blood?

A. No, sir, I didn't.

Q. Didn't you ever tell them that?

A. I don't think I did.

Q. Did you know whether or not they had that understanding?

A. I kind of think they did; I heard them talk it.

Q. Did you read the "Tomahawk," more or less—Gus Beaulieu's paper? A. Sometimes I did, yes, sir.

Q. Did you, along about that time, read newspaper articles by him, and editorials, treating the mixed-bloods as being those that were, like himself, very much white blood?

A. I don't remember that I did. If they were in there, I might have read them, and I might not; I didn't get the paper regularly.

Q. Don't you know, as a matter of fact, that there was a time, when the Clapp Act first passed, that Mr. Beaulieu thought that the term "mixed-blood" had reference to such as himself? A. That might be.

Q. Don't you know that he did so understand it?

A. I don't know that he—I won't say that I didn't know it; but I don't really remember it; I don't know as I ever heard him mention it.

Q. But, in any event, what constituted a mixed-blood, under the purview of the Clapp Act, was a much mooted question, was it not, and you started out to get satisfied as to how far you could go in that direction before you made any investment; is not that true? A. Yes, sir.

Q. And you consulted your own lawyers, and listened to the talk of laymen, on the subject? A. Yes, sir.

Q. And you didn't even feel satisfied, after you had talked with this first lawyer on that point, did you?

A. Well, I presume I would have proceeded under that, but we had other lawyers in Minneapolis. I had also done business with Mr. Fryberger, and I consulted them both.

Q. And you kept on, until you had consulted in fact, how many lawyers before you quit?

A. I consulted Mr. Lindberg, of the firm of Lindberg & Blanchard; Mr. Fryberger, of Duluth; Merrill & Powell; and Mr. Clapp, in the presence of Mr. Powell.

Q. All at the same time, or different times?

A. Different times.

Q. And then you talked with laymen after that?

A. Yes, sir.

Q. Business men? A. Yes, sir.

Q. From the time you first made inquiry, about, before you made any investment, how long a period expired?

A. Well, shortly after the Clapp Act passed I consulted our attorneys in Little Falls, and I think I made contracts—that was sometime in June—I don't know when they became
64 of force—sometime after the first of July—I bought the first timber, made the first contract, rather, to buy the timber.

Q. In the meantime, had you seen the other lawyers you mentioned? A. Yes, sir.

Q. So you made no investment until after you had talked with all of those lawyers? A. Yes, sir.

Q. Was the question raised at any time, in any of these interviews with these lawyers, as to just how much foreign blood would constitute other than an Indian? A. No, sir.

Q. Would constitute a mixed-blood? A. No, sir.

Q. They just simply told you that mixed-blood could sell?

A. Yes, sir.

(By consent of Mr. Powell, Mr. Gordon Cain was here permitted to further cross-examine the witness).

By Mr. Cain:

Q. Your company, Mr. Nichols, is the defendant in quite a number of these suits, is it not? A. Yes, sir.

Q. And is rather heavily interested financially in the outcome of these suits? A. Yes, sir.

Q. When you first started buying the timber up there, Mr. Nichols, you got your title simply by deed, did you not, from the Indian?

A. Well, I made a contract with them first.

Q. Then you perfected it by a timber-deed?

A. Yes, sir, timber-deed or warranty deed.

Q. You did not, in the first instance, contemplate the obtaining of fee simple patents, did you—you didn't expect to get fee simple patents upon this property, when you first commenced purchasing? A. I think we did.

Q. Well, to refresh your recollection now, did not you testify, Mr. Nichols, at Fergus Falls, that the idea of getting fee simple patents came along considerably later?

A. Oh, sure; we just made a contract for them to deliver title when they got it.

Q. You didn't look to the obtaining of fee simple patents at all, in the beginning?

A. No, sir; paid no attention to it; just made a contract for the timber.

Q. You, later, took a warranty deed? A. Yes, sir.

Q. When you took the warranty deeds, you didn't have in mind the taking of fee simple patents?

A. I think we got a great many fee simple patents with the warranty deeds.

Q. I understand you got the fee simple patents later?

A. Yes, sir.

Q. Your instructions to Mr. Beaulien, and your other agents, were simply about getting deeds? A. Yes, sir.

Q. And they had nothing to do with the obtaining of fee simple patents in the beginning? A. No, sir.

Q. That was a later thought? A. Yes, sir.

Q. What was the reason for changing your policy?

A. I don't know, Mr. Cain, that we changed our policy; I didn't take any deeds, you understand, at the time I made the purchase of the timber.

Q. You took a contract first? A. Yes, for a deed.

Q. And then you took the deed? A. Yes, sir.

Q. Later on, however, you decided that you would get fee simple patents?

A. Well, you know, I made a contract for a deed, and agreed to pay them when they gave me good title to it; we took deeds, because the Indian was coming to us all the time for a little more money, a little more money; and we thought perhaps when he got enough he would not give us a deed to the land; so we took a deed, you understand, and held back money in all cases, nearly all cases, until he furnished us perfect title.

Q. What do you understand by "perfect title"?

A. A fee simple patent.

66 Q. Do not get away from me, Mr. Nichols. Didn't you testify at Fergus Falls, that when you first started your transactions you didn't have in mind the taking of fee simple patents at all?

A. Certainly—no, I think that is right, yes.

Q. That the idea of taking fee simple patents was an after-thought?

A. Yes, I think you are right; I think that is correct.

Q. The policy of your company, in the first instance, was to get your title by deed, depending upon the Clapp Act to make it a good title? A. Yes, sir; exactly.

Q. Later on you changed your policy and began securing fee simple patents? A. Yes, sir.

Q. Why did you change your policy?

A. Well, I can't just say. I knew that a fee simple patent was certainly a clear title.

Q. Wasn't it because you were in doubt as to your title?

A. Well, many of those Indians would come to us for money, and we had finances advanced, you understand, when we first took our contract. We didn't pay them a very big amount of money, and if we should be caught—now, some of them would come in and make affidavits that they were mixed-bloods, and if they had sworn falsely to us, or misrepresented the case, we could not have lost very much. But, when we came to pay the full amount, if there was any doubt, we held the money back and insisted on a fee simple patent.

Q. When there was doubt as to what?

A. As to whether they came under the purview of the Clapp Act.

Q. Well, if they didn't come under the purview of the Clapp Act, they were not entitled to fee simple patents?

A. Certainly not; no, sir.

Q. You were insisting on your fee simple patent?

A. Before we paid them, if they couldn't produce a fee simple patent, we didn't want to pay them.

Q. What was the reason for the change in your policy, from not requiring fee simple patents, to requiring fee simple patents? Wasn't it doubt as to the effect of the warranty deed?

A. Sure; yes, sir, it was; in case they might not be a mixed-blood; might not come under the purview of the Clapp Act.

Q. Well, then they couldn't get fee simple patents?

A. No, sir; we would not expect them to get fee simple patents. But, they were insisting on us carrying out the provisions of the contract, to give them the money for a warranty deed.

Q. Wasn't your object, in obtaining fee simple patents, this: That you were somewhat doubtful of your title, as it existed under the Clapp Act, yourself, and that you wanted to perfect your title by a fee simple patent?

A. Do you mean to say, where we knew that a party was a half-breed?

Q. No, I don't mean to say that at all. I mean to say just simply this: At one time in your career in business

down there, you didn't require fee simple patents—and you have stated that that is the truth. Now, why did you change and begin to require fee simple patents? Didn't you have advice that your title was doubtful?

A. I think we did have advice not to pay our money in full until we got fee simple patents.

Mr. Cain: Well, I guess that is all.

Redirect Examination

By Mr. Powell:

[—] Mr. Cain has asked you, What was the occasion for the change? Isn't it a fact that I was the occasion for the change?

Mr. Norton: Objected to as leading.

The Court:

A. Yes, sir, I think so; I think we were advised by you.

GS Q. He has asked you whether that change was made under advice?

A. Yes, sir. As I say, we were advised not to pay our money until we got our fee simple patents.

Q. Who advised you? A. Mr. Powell.

Mr. Norton: You mean counsel sitting here?

The Witness: Yes, sir.

Q. Now, you have stated that you consulted all of these lawyers you have mentioned before you commenced to buy timber, and I will now ask you whether or not that statement was an inadvertence?

Mr. Norton: Objected to as leading.

The Court:

A. Yes, sir.

Q. Do you want to correct that statement?

A. Yes, sir, I do.

Q. Counsel asked you the question as to your consulting these various lawyers whom you name, and asked you whether or not you consulted all of these lawyers before you commenced to buy any timber under the Clapp Act, after the passage of the Clapp Act. I will ask you if that is true, or an inadvertent statement?

A. No, that wasn't true. I consulted the firm of Lindberg & Blanchard before I bought any timber; the others, I consulted at different times, afterwards.

Recross Examination

By Mr. Norton:

Q. Even after they gave their advice, you still had fears on that proposition, had you?—so you went around to get yourself right on it?

A. Well, after they had all stated, you said?

Q. No. But, you first told me you consulted all these lawyers and got all this advice before you ventured to make any investment. Now, you correct it by saying that you consulted but one firm of lawyers and then began to purchase.

Now, I am saying, then, that after you began to purchase, you still had fears lest his advice was not quite correct? A. Yes, sir; I got other advice, yes, sir.

A. Yes, sir; I got other advice, yes, sir.

Q. And, after you took advice from the next, you still had fears on that point until you saw still other lawyers?

A. I had no fears before I consulted my attorneys.

Q. You were enough in doubt, so you consulted your lawyers? A. Yes, sir.

Q. And several lawyers, after you had begun to invest, even? Is that right? A. Yes, sir.

Re-redirect Examination

By Mr. Powell:

Q. Isn't it a fact, Mr. Nichols, that many of these consultations, that counsel has referred to, occurred after the controversy had developed, in 1908?

Mr. Norton: Objected to as leading.

The Court:

A. Yes, sir.

Re-recross Examination

By Mr. Norton:

Q. How much had you invested on the first consultation you had? A. I couldn't say.

Q. Was it to considerable of an extent? A. No, sir.

Q. What? A. Not much.

Q. Very little? A. Very little.

Q. How long after you made that first investment before you consulted another lawyer?

A. Well, it wasn't a great while; I was in Duluth and in Mr. Fryberger's office.

Q. Well, about how long? A. A few days, or a few weeks?

A. Probably a couple of weeks.

Q. When did you make your first investment?

A. The fore part of July, 1906.

70 Q. Then it was still in July when you had the second consultation? A. Yes, sir.

Q. When was it when you had your third consultation? About how long after that?

A. I think it was the latter part of the year, 1907, when I consulted Merrill & Powell.

Q. How many had you consulted before that?

A. The firm of Lindberg & Blanchard and Mr. Fryberger.

Q. And both of those consultations were in July?

A. Yes, sir.

Q. The July that you commenced to invest? A. Yes, sir.

Mr. Norton: That is all.

Mr. Powell: That is all.

Witness excused.

71 L. F. BULLIS, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Powell:

Q. Mr. Bullis, you reside in Detroit, Minnesota? A. I do.

Q. How long have you resided here?

A. Since February, 1906.

Q. Where did you reside prior to that time?

A. At Kenmare, North Dakota.

Q. How long had that been your home?

A. Since—I believe it was—along the 10th to the 15th of February, 1902.

Q. You are not a native of North Dakota, then?

A. No, sir.

Q. What had been your home prior to removing to North Dakota? A. Iowa.

Q. What portion of Iowa? A. Winneshiek County.

Q. In what business are you engaged at the present time?

A. In the banking business.

Q. With what bank?

A. The First National Bank of Detroit, Detroit, Minnesota.

Q. What position do you occupy with that bank?

A. Cashier.

Q. How long have you been in the banking business?

A. For ten or eleven years.

Q. Do you remember the occasion of the passage of the Act of Congress, which we are in the habit of referring to as the "Clapp Act", in June, 1906?

A. Yes, I remember of hearing of it.

Q. You state, I believe, that you lived here at that time?

A. I did.

Q. Have you or your associates ever dealt to any extent in lands upon the White Earth Reservation since the passage of that Act?

A. Well, there were a great many—or, a number of loans, came into the bank at that time.

Q. Those were passed upon by you?

A. No, sir; by Mr. Anundsen.

Q. He was president of the bank?

A. He was president of the bank.

72 Q. He is since deceased, I think? A. Yes, sir.

Q. Were you associated with Mr. Anundsen and other associates, outside of your connection with the bank, in any other land transactions or dealings in connection with lands on the White Earth Reservation? A. Yes, sir.

Q. To a considerable extent? A. To some extent.

Q. In a general way, state, Mr. Bullis, what sort of business it was that was transacted by yourself and associates in those lands, as to whether the lands were purchased and improved by you or sold and dealt with as a real estate transaction?

A. They were as real estate transactions, buying and selling the lands on the White Earth Reservation.

Q. You didn't do any farming business?

A. No, I did no farming.

Q. During that period, from the passage of the Clapp Act down to the time when this litigation or controversy over the rights of the Indians to sell on the White Earth Reservation commenced, state whether or not you heard discussions from time to time, among business men in this city and surrounding territory, as to the meaning of the term "mixed-blood" in that Act?

Mr. Norton: Objected to as incompetent, irrelevant and immaterial. All the testimony of this witness along that line may be admitted under that objection?

Mr. Powell: Yes.

The Court:

A. I have.

Q. I will ask you to state whether that subject was more or less under discussion among the persons around the Reservation engaged in dealing with those lands and others during that period? A. It was.

73 Q. State what the understanding of the people around the Reservation, during that period of time, was, as to the meaning of that term?

Mr. Norton: I renew my objection there.

The Court:

A. A mixed-blood was one whose ancestry could be traced back and a white person could be found along his line, no matter how far back; or a person of a mixed-blood, any other blood than an Indian.

Q. Can you relate any particular discussions that you heard of that question, in your presence?

Mr. Norton: I renew my objection.

The Court:

A. Yes, sir.

Q. If you can, so state it? A. Yes, sir.

Q. What was it?

A. I have often talked with Mr. Anundsen, and particularly when he took the first loan into the bank, as to the Clapp Act, and the meaning of the word "mixed-blood, and the idea conveyed to me from my conversations with him was, that a person was a mixed-blood if it could be shown that anywhere in his ancestry there was a person of any other blood.

Mr. Norton: I object to that. Conversations should be given, and not the conclusions drawn by the witness.

The Court:

Q. Did you hear Mr. Anundsen discuss that question with others in the bank? A. I have.

Q. Do you remember any particular discussion between him and anyone else? If you do, so state it?

A. With W. B. Carman.

Q. Who is W. B. Carman?

A. He is an attorney in the City of Detroit. I also heard him discuss it with Senator Clapp.

Q. Senator Moses E. Clapp?

A. Senator Moses E. Clapp.

Mr. Norton: This is all under this same objection?

74 Mr. Powell: Certainly.

The Court:

Q. To the same effect as you have stated?

A. To the same effect that the word "mixed-blood", as we construe the word "mixed". I also heard him talk with Mr. Steenerson.

Mr. Norton: The same objection.

The Court:

Q. To the same effect? A. To the same effect.

Q. From your knowledge generally of the land business in this vicinity, Mr. Bullis, are you able to state, in general terms, to what extent the lands upon the White Earth Reservation have changed hands since the passage of that Act? I mean in acres, or in percentages, as compared with the total acreage of the Reservation?

A. No, I don't know that I have ever heard that stated.

Q. Well, can you state whether it was extensive or not?

A. It was very extensive.

Mr. Norton: I think that might not come under that objection. I wish to object in time there, as being incompetent, irrelevant and immaterial.

The Court:

Mr. Powell: Of course, as a matter of fact, none of these objections are waived, except the objection to the form of the question. You can make any and all of these objections before the Court.

Mr. Norton: Yes; but I want to make sure.

Q. Are the lands that you sold held by persons in this vicinity, or have they passed to persons outside of this locality?

A. Well, they have passed to a great many outside of this locality. We have brought farmers in from Iowa, Illinois, South Dakota and other states, and settled them there.

Q. Have those farmers purchased land from you and settled on the White Earth Reservation? A. Yes, sir.

Q. Are you able to state about how many settlers of that character you have sold lands to on the White Earth Reservation?

Mr. Norton: The same objection.

The Court:

A. Well, I couldn't state anywhere near, exactly.

Q. Well, of course, we would not expect that. But, could you give us an estimate?

A. I should judge in the neighborhood of sixty.

Cross-Examination

By Mr. Norton:

Q. You dealt in these lands purely for speculative purposes, did you? A. No, sir, as an investment.

Q. Well, that is what I mean?

A. A banker looks at the two differently.

Q. You didn't buy them to hold them indefinitely?

A. No, sir.

Q. But you bought them to sell? A. Yes, sir.

Q. And, when you sold, what sort of a deed did you make, a quitclaim or a warranty deed?

A. A warranty deed, in most cases.

Q. Are any of the lands that you have dealt in now involved in the chancery cases brought by the Government?

A. Yes, sir.

Q. About what percentage?

A. As to the total of all bought?

Q. Well, those that you have been testifying in reference to, that you have sold? A. How many involved?

Q. About?

A. I couldn't tell you exactly; I could not give an approximate of them.

Q. Nearly all, aren't they? A. No, I don't think so.

Q. Isn't it practically all—I mean, that you have sold?

A. That are involved in these suits?

Q. Yes?

A. No, I don't think half of the ones that are sold are involved in these suits.

Q. There may be half or may be more?

A. I don't believe it.

Q. About a half of them?

A. I don't believe there is one-half.

Q. Ten per cent?

A. Well, I wouldn't want to go any closer than to a half.

Q. Might be about a half? A. Something like that.

Q. And, are some of the lands that you still hold also involved in the chancery cases? A. Yes, sir.

Q. To quite an extent?

A. There are quite a number of cases.

Q. What percentage of the lands that you still hold? Just give me your estimate?

A. I should think somewhere along about sixty per cent.

Q. Then, over one-half, all taken together, are now involved in the chancery cases, are they not?

A. I should think so, yes.

Q. What percentage is involved of those lands that you have sold to farmers, if any?

A. Well, I think that would come under my first reply; something about one-half.

Q. Well, I am segregating them from the other. You had about sixty farmers in all? A. Yes.

Q. Now, there are not thirty suits involved against those farmers, are there—as a matter of fact, there aren't any, are there? A. Oh, yes, indeed, there are.

Q. Well, I am asking you how many?

A. Well, I can't tell you just at present.

Q. Very few, if any, aren't there?

A. Well, I can think of only a few.

Q. Isn't it a fact, that there aren't half a dozen?

A. Well, I couldn't say about that; I think there is more than that.

77 Q. But you won't say that you know there were?

A. No, I won't say positively, in regard to any of the percentages.

Q. You don't know—you can't recall of three specific instances, can you, against those sixty farmers?

A. No, not off-hand; I would have to refer to the books, and I never checked it up.

Q. And it is possible there are not one against those farmers? A. Oh, yes, there are more than that.

Q. And there may not be six, to your knowledge?

A. I think there is more than six.

Q. Well, do you know there is more than six?

A. I can't figure them up just at present, no.

Q. You can't name a half a dozen at this time?

A. No.

Redirect Examination

By Mr. Powell:

Q. How much of an institution is the First National Bank of Detroit?

A. It has a capital of fifty thousand dollars, and a surplus of ten thousand.

Q. Engaged in the general banking business?

A. Engaged in the general banking business.

Mr. Powell: That is all.

Mr. Norton: That is all.

Witness excused.

78 A. L. THOMPSON, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Powell:

Q. Where do you reside, Mr. Thompson?

A. I live in Mahnomon, Minnesota.

Q. That is the county-seat of Mahnomon County?

A. Yes, sir.

Q. Mahnomen County lies entirely within the White Earth Reservation, does it not? A. Yes, sir.

Q. How many townships are comprised in that county?

A. Sixteen.

Q. What is the general character of that territory comprised in Mahnomen County, as to being timbered or prairie land?

A. Well, the west twelve townships are nearly all prairie, and the east row, four townships, is timber, oak timber.

Q. What kind of timber generally?

A. Well, the east part of that range is oak—the west part is oak, and in the east, you get into the pine.

Q. How long have you resided at Mahnomen?

A. It will be five years last June.

Q. That would mean, then, that you moved there in June, 1907? A. Yes, sir.

Q. What is your business?

A. I am interested in banking, and the land business; I have a lumber business, too.

Q. Where did you reside prior to your removal to Mahnomen? A. I lived at Northwood, Iowa.

Q. Were you in business there? A. Yes, sir.

Q. In what line? A. I practiced law there.

Q. You were not engaged in the practice of law in Minnesota?

A. Why, I am, when I have time for it; I don't make it a specialty.

Q. That is a side issue to your banking business?

A. Yes, sir.

Q. Has your bank dealt any in loans upon the White Earth reservation? A. Yes, sir.

Q. Have you or your associates in the land business dealt in lands generally in Mahnomen County on the reservation?

A. Yes, sir; that has been a part of my business, to buy and sell.

Q. And that has been your business ever since you moved there, in 1907? A. Yes, sir.

Q. When did you first become acquainted with the provisions of the so-called "Clapp Act", of June 21, 1906, and March 1, 1907?

A. Well, I heard of the passage of the Act in the fall of 1906, that the White Earth lands, some of them, were on the market for sale, and early in the spring of 1907, I took a trip up to this country and looked it over, and then I came back in June and spent all of the month up there, getting familiar with conditions before I did any business.

Q. Have you during the period, since your arrival at Mahnomen and down to the commencement of this controversy and litigation over the White Earth titles, had occasion to discuss with others around the reservation the construction of the term "mixed-blood" in the Clapp Act? A. Yes.

Q. You may State whether or not you have heard the matter generally discussed among people around the Reservation during that period?

Mr. Norton: Objected to as incompetent, irrelevant and immaterial.

The Court:

A. Yes, I have heard a great deal of that talk, of course, in the locality where I have lived.

Q. In that locality, was it a matter of general and common discussion among the business men and others, as to the construction of that term?

Mr. Norton: The same objection.

80 The Court:

A. Yes, I know it was discussed among the business people when I first came to Mahnomen; that is, when I was investigating the probability of going there to do business, I talked these things, and got my information, as any man would do before he moved.

Q. Did you have any talk with the Indian Agent, who was in charge of the Agency at that time, on that question?

A. Why, I remember going to White Earth on my first trip up here and talked with Gus H. Beaulieu,—

Mr. Norton: The same objection.

A. —I called at the Agency, but I don't remember whether I talked with the Agent about the question of blood of the Indian.

Q. The term? A. Yes, sir.

Q. You may state what was the general question or understanding of the people in your locality during that period, in regard to the construction of that term?

Mr. Norton: The same objection.

The Court:

A. When I came to Mahnomen, in June, 1907, they were doing considerable business, land business, there; that is, not so extensive, but there were quite a number of Indians selling their lands, and if the Indians claimed or could show they were mixed-bloods, regardless of the quantum, they succeeded

in making a sale of their property; and that is the view I have taken of the Clapp Act; if an Indian was mixed, I didn't consider the quantum of the blood, or how much.

Q. Is that the view taken generally by the business men dealing in lands around the White Earth Reservation, so far as you know?

81 Mr. Norton: The same objection, and the additional one, that it is leading.

The Court:

A. Well, I know most all the business men on the White Earth Reservation, and I know that that is the view they have taken.

Q. Can you state how extensively the business men in your locality have been engaged in buying and selling White Earth reservation lands since you arrived there in 1907?

A. Well, I know about how much of the property had changed hands up till January, this last January, or February.

Mr. Norton: The same objection.

The Court:

Q. Speaking now, particularly, of Mahnomen County?

A. Yes, sir, only of Mahnomen County. What I mean: I know about the percentage that has been disposed of.

Q. About what percentage was that, of the whole amount of land in that County?

A. Well, we made a tabulated statement from the records in the courthouse—I think it was in December or January—and of the prairie lands, farm—prairie—lands, that were either sold or mortgaged by the allottee, it was nearly seventy per cent, that were either sold or mortgaged, prairie lands; and, taking the sixteen townships all together, including the timber, it was sixty-four per cent.

Q. To what extent, Mr. Thompson, did the Indians occupy or improve the lands in Mahnomen County, or had they occupied, or were they occupied, improving lands, in Mahnomen County, at the time you went there in 1907?

Mr. Norton: The same objection.

The Court:

A. Well, when I came there in 1907, I drove all over the county, just to see the country and get acquainted with the lands, and there was some of those prairie townships that didn't seem to have over half a dozen families in them.

82 I know the township north of Mahnomen, except for five families on Marsh Creek, there wasn't an Indian or white man in it, and the lands were not used for anything.

Q. That was generally true of the prairie townships?

Mr. Norton: The same objection, and the additional one that it is leading.

The Court:

A. Yes, sir; and the two townships north, up to the county-line, were just the same—full townships—and were not occupied.

Q. Is there anything, in the way of buildings or fences or broken land, to indicate that they had been occupied?

A. In very many townships—the township nearest Norman County line, where the French Pembina Indians had lived for a long time, there had been some farming there,—but it had been by white tenants,—a few years before.

Cross-Examination

By Mr. Norton:

Q. Then, when you first went up there, this question of what the term "mixed-blood" really meant, was being much discussed in Mahnomen County, when you first went there?

A. The question whether a person was "mixed" or "full".

Q. That discussion was kept up, pro and con, up to the present time, hasn't it?

A. Yes; if an Indian came into an office to sell his property, the question was, What was his blood? was the first question asked.

Q. I am not asking you about the individual Indians. I am speaking in all questions, of what the term "mixed-blood", as used in the Clapp Act really meant. It was very much discussed, pro and con, when you first went there, and has been ever since, hasn't it, to a considerable extent?

S3 A. I couldn't say that the question of the blood has been discussed; it is simply the question of whether an Indian was mixed or not; the quantum of blood wasn't discussed by anybody.

Q. Then, did you misunderstand Mr. Powell's question, when he asked you if that had been discussed, and you said "Yes." Did you mean that the discussion was as to whether a certain individual was a mixed-blood? A. Yes, sir.

Q. Then, you have never discussed the question of what the term "mixed-blood" meant in the Clapp Act?

A. The people do not discuss the quantum of blood, because they don't know anything about that.

Q. If you will answer my question. I am only asking you to say "Yes," or "No," to this question: Then you have never heard the question discussed, as to what the term "mixed-blood" meant? A. No, that has not been discussed.

Q. That has never been discussed? A. No.

Q. You went right in, without asking any questions about that? A. I based my judgment—

Q. Answer "Yes," or "No"?

A. I went ahead and did business with mixed-bloods.

Q. Well, I will ask it again—do you claim you don't understand my question, or are you trying to dodge it?

A. No. I want to be frank with you. I have no reason to dodge anybody's question.

Q. Then, as I understand you, you have never heard the question discussed, by anybody, as to what the term "mixed-blood", used in the Clapp Act meant?

A. No, sir, that has not been discussed.

Q. That has never been discussed? A. No, sir.

Q. You satisfied yourself on that, without talking with anybody about it?

A. No, sir; I construed the Clapp Act in my own way. I never consulted any attorney or talked with anybody as
84 to the quantum of blood.

Q. You have never stood by and heard anybody else discuss it at all?

A. No, I don't think I ever have heard that question discussed, as to what was a mixed-blood. That question never was raised until it was raised by the agents of the Government, the quantum of blood.

Q. But it has never been discussed up there at Mahnomen, in your hearing, among the business men at all?

A. The quantum?

Q. I mean, in your hearing?

A. No, they don't discuss the quantum of blood.

Q. You state that you have never heard that discussed by anybody?

A. They don't raise that question; that wasn't the question at all.

Q. And you have never raised the question in your own mind? A. No.

Q. And you have never asked what anybody else's opinion on it was? A. No, sir.

Q. And have never heard anybody else question it in either way? A. No, sir.

Redirect Examination

By Mr. Powell:

Q. You have construed the Act yourself, to mean what?

Mr. Norton: Objected to as incompetent, irrelevant and immaterial.

The Court:

A. I took the Act to mean just what it says; that every mixed-blood Indian was emancipated.

Q. Well, what is a "mixed-blood"? What do you understand a "mixed-blood" to mean?

Mr. Norton: The same objection.

The Court:

85 A. Why, any person that has any other blood but Indian blood.

Q. That is the construction upon which you have carried on your business?

Mr. Norton: The same objection, and leading.

The Court:

A. Yes, sir.

Q. Do you know whether other business men in your neighborhood, in your vicinity there, dealing in lands on the White Earth Reservation, have proceeded upon the same construction, the same construction or a similar construction? The question is: Do you know?

Mr. Norton: The same objection.

The Court:

A. Yes, sir, they did.

Q. I asked you the question as to whether you know. State whether they did or not?

Mr. Norton: The same objection.

The Court:

A. They did.

Recross Examination

By Mr. Norton:

Q. Now, I understood you to say you were a lawyer; is that right?

A. Yes, sir; that is my profession, yes, sir.

Q. Do you recollect swearing, in answer to my question, that you never heard the question of what the term "mixed-blood" meant, as used in the Clapp Act, discussed by anybody. Didn't you so state to me? A. That is true.

Q. Is that a fact?

A. I don't remember anybody discussing it.

Q. Is that a fact yet? A. Yes, sir.

Q. How on earth, as a lawyer, did you undertake to tell
86 Brother Powell, that all the other business men have had that construction of the Clapp Act that you have given? Now, as a lawyer, explain yourself?

A. They did business the same as I have done.

Q. How do you know?

A. I have seen them. I have done business with them.

Q. You never heard one of them say what he thought "mixed-blood" meant, as used in the Clapp Act?

A. No.

Q. How on earth, as a lawyer, do you know that they dealt with that notion in their heads, when you never heard them express it?

A. They were dealing with mixed-bloods.

Q. Is that all you know about it?

A. That is all they required to know.

Q. If they dealt with an Indian, you took it for granted that they had the same definition as used in the Clapp Act as you did? A. Yes, sir, exactly.

Q. Is that all you know about it?

A. I think that is enough.

Q. Is that enough to satisfy you that you know a blamed thing about what was going on in their minds, if you never heard them use the word one way or the other?

A. We wasn't arguing or discussing the question of what constituted a mixed-blood.

Q. Then how are you enabled to tell Brother Powell that they gave the same definition that you gave them?

A. Well, if you asked them Who was a mixed-blood? they would say: Any person that had any Indian blood.

Q. How do you know? You said you had never heard the question?

A. That is an inference, from the class of men on the Reservation doing business.

Q. Are you testifying on inferences only?

A. Not altogether.

Q. Well, you are on that proposition?

A. I don't think so.

Q. Don't you know that your testimony shows it so, that you have testified time, and time, and time and again, that you never heard a business man in Mahnomen express his opinion as to what constituted a mixed-blood. Now, you tell Brother Powell, and I want to again remind you, as a lawyer, that you know that the general run of business men up there transacted business with that definition of the term "mixed-blood" in their minds. Didn't you so state?

A. Why, I think that is what they did.

Q. Then you are testifying to what you think, and not to what you know?

A. I know that from observation.

Q. What observation have you had?

A. I have lived there five years.

Q. But, during that five years, you told me, under your oath, that you never heard a man express his opinion of what constituted a mixed-blood; is that right?

A. Well, I don't suppose the quantum of mixed-blood—

Q. Will you kindly state whether or not you understand that question?

A. Well, maybe I don't understand your question.

Q. Well, all right; we will see, then, how dense you are. But, during that five years, you told me, under your oath that you never heard a man express his opinion of what constituted a mixed-blood; is that right? A. That is right.

Q. That you never did hear. Is that right?

A. I don't think I have heard anybody express, say, what they thought constituted a mixed-blood.

Q. That is right. That is what I am trying to get you to say. Now, will you explain, as a lawyer—I won't ask it as a layman—will you explain, as a lawyer, what enables you to tell Mr. Powell that those men have been doing business with that understanding of the term "mixed-blood", when you haven't heard them say a blamed word about it?

A. Well, I don't think we have discussed that question of the blood. We have sat down and discussed the question as to the quantum of blood in an Indian.

Q. That was required to make a mixed-blood?

A. No.

Q. Then, how on earth are you able to tell Brother
88 Powell that they thought, when they sold their lands, that any Indian, with any amount of other blood, no matter how little, constituted a mixed-blood, when you never heard them say any such thing—were you guessing at it?

A. No, I wasn't guessing, because I know how people have done business; I know they have done business the same as I have done business.

Q. How, in the name of common-sense, much more the sense of a professional man and a lawyer, are you enabled to say that they have been doing business with that idea in their minds, when you never heard them say a word?

A. Well, I know they have; that is all there is to it.

Q. Well, how do you know it, if you never heard them say a word? That will answer my question?

A. Well, I know they have done business the same as I have.

Q. How do you know?

A. I have seen it and observed it.

Q. Did you see them think that a mixed-blood was one with ever so little other blood?

A. No, I didn't see them think it; I saw them doing business with mixed-bloods.

Q. Then, all you know about what a mixed-blood is, you have seen them doing business with individuals that you would think was a mixed-blood; is that right?

A. Yes, sir.

Mr. Norton: That is all.

Mr. Powell: That is all.

Witness excused.

(At this time the hearing was adjourned until further notice).

89 The above entitled cause was regularly brought on for the taking of additional testimony, before J. J. Cameron, Esquire, Special Examiner, pursuant to the order of the court heretofore made herein, on the 30th day of August, A. D., 1912, at 512 Federal Building, Minneapolis, Minnesota; Charles C. Houpt, Esquire, United States District Attorney, and Messrs. W. A. Norton and Gordon Cain appeared on behalf of the Government and R. J. Powell, Esquire, appeared on behalf of the defendant.

Whereupon the following proceedings were had:

Mr. Powell: The defendant offers in evidence Defendant's Exhibit 2, being the testimony and stipulations of [counsel], taken before Trezevant Williams, a Notary Public, in the City of Washington, D. C., on the 15th day of August, 1912.

Mr. Norton: Subject to the objection that it is incompetent, irrelevant and immaterial.

The Court:

90 Mr. Powell: I offer in evidence Defendant's Exhibit 3, being certain stipulations covering the testimony of Simon Michelet and George A. Morrison.

Mr. Norton: Objected to as incompetent, irrelevant and immaterial.

The Court:

Mr. Powell: I offer in evidence Defendant's Exhibit 4, consisting of a map of the White Earth Reservation, colored to exhibit the lands that have been sold, encumbered and now affected by suits brought by the United States to cancel conveyances, including the tabulated statement thereon.

Mr. Norton: The same objection.

The Court:

Mr. Powell: I offer in evidence Defendant's Exhibit 5, the printed list or schedule of the Indians upon the White Earth Reservation, in the State of Minnesota, prepared by E. H. Long, Special Assistant to Attorney General, and J. H. Hinton, Special Indian Agent, and approved by R. G. Valentine, Commissioner of Indian Affairs, and R. A. Ballinger, Secretary of the Interior, on December 31, 1910.

Mr. Norton: The same objection.

The Court:

Mr. Powell: I offer in evidence Defendant's Exhibit 6-A, which is the original application of William Big Bear for a fee simple patent covering his additional allotment No. 166; I also offer in evidence Defendant's Exhibit 6-B, which is the joint affidavit of Frank Roy and Equay-me-dogay, or Susanna Roy, attached to and accompanying the foregoing application; I also offer in evidence Defendant's Exhibit 6-C, which is the letter of Simon Michelet, Indian Agent at White Earth, transmitting the application and affidavit, Exhibits 6-A and 6-B; it being admitted that these exhibits are original files of the Office of the Bureau of Indian Affairs.

Mr. Norton: The same objection.

The Court:

Mr. Powell: I offer in evidence Defendant's Exhibit 7-A, which is the original application of Ne-bi-nay-geshig, for a fee simple patent for additional allotment, No. 1314; also Defendant's Exhibit 7-B, the joint affidavit of W. D. Aspinwall and Charles Moulton, in support of the same; also Defendant's Exhibit 7-C, which is a letter from John R. Howard, Indian Agent at White Earth, transmitting the same to the Commissioner of Indian Affairs; also Defendant's Exhibit 7-D, being letter of E. H. Long, Special Assistant to Attorney General, and J. H. Hinton, Special Indian Agent, recommending favorable action upon the application; it being admitted that these exhibits are original files of the office of the Bureau of Indian Affairs.

Mr. Norton: The same objection.

The Court:

Mr. Powell: I offer in evidence Defendant's Exhibit 8-A, being the original application of Catherine Roy, for a fee simple patent, covering her additional allotment, No. 821; also Defendant's Exhibit 8-B, being joint affidavit of Alex. McDougal and John St. Luke, in support of the same; also Defendant's Ex-

hibit 8-C, being letter of John R. Howard, Indian Agent at White Earth, transmitting the same to the Commissioner of Indian Affairs; it being admitted that these exhibits are original files of the office of the Bureau of Indian Affairs.

Mr. Norton: The same objection.

The Court: *Overruled.*

92 Mr. Powell: I offer Defendant's Exhibit 9-A, being application for a fee simple patent of Peter Big Bear, covering his additional allotment, No. 167; also Defendant's Exhibit 9-B, being affidavits of Mah-eng-annce and Ah-num-e-nance, in support of the same; also Defendant's Exhibit 9-C, being letter of E. H. Long, Special Assistant to Attorney General; and Defendant's Exhibit 9-D, being letter of J. H. Hinton, Special Indian Agent at Detroit, Minnesota, transmitting the same; it being admitted that these exhibits are original files of the office of the Bureau of Indian Affairs.

Mr. Norton: The same objection.

The Court: *Overruled.*

Mr. Powell: I offer in evidence Defendant's Exhibit 10-A, which is the original application of Quay-koonce, or William Daily, for a fee simple patent covering his original allotment, No. 4746; also Defendant's Exhibit 10-B, being joint affidavit of Ah-zhow-ah-cunnig-ish-kung and Wah-we-vay-cunig, in support of the same; also Defendant's Exhibit 10-C, being letter of E. H. Long, Special Assistant to Attorney General, and J. H. Hinton, Special Indian Agent, transmitting the same; it being admitted that these exhibits are original files of the Office of the Bureau of Indian Affairs.

Mr. Norton: The same objection.

The Court: *Overruled.*

Mr. Powell: I offer in evidence Defendant's Exhibit 11-A, which is the original application of Mosh-kibay-aush, or Sam Pine-Day for a fee simple patent covering his additional allotment No. 1622; also Defendant's Exhibit 11-B, being joint affidavit of Kah-n-gane-in-de-bay, or Joe Broad, and O-jib-way, in support of the same; also Defendant's Exhibit 11-C, being letter of Simon Michelet, Indian Agent at White Earth, transmitting the same; it being admitted that these exhibits are original files of the Office of the Bureau of Indian Affairs.

Mr. Norton: The same objection.

The Court:

(Stipulation.)

It is stipulated by and between counsel for the respective parties that fee simple patents were issued by the United States to each of the allottees named in the foregoing exhibits, from Defendant's Exhibit 6 A to 11 C, inclusive, in compliance with the applications and proof submitted, as shown by these exhibits.

Mr. Norton: I offer in evidence Government's Exhibit C.

(At this time an adjournment was taken to September 2nd, 1912, at Duluth, Minnesota).

94 (Defendant's Exhibit 2.)

Depositions taken before Trezevant Williams, a Notary Public in the City of Washington, D. C., on the 15th day of August, 1912, Gordon Cain, Esq., Special Assistant to the Attorney General, appearing on behalf of the plaintiff, and R. J. Powell, Esq., appearing on behalf of the defendant.

It is stipulated by and between counsel for the respective parties that the testimony of such witnesses as either party may desire to call from the office of the Commissioner of Indian Affairs in Washington may be taken before Trezevant Williams, a Notary Public in and for the District of Columbia, and reduced to writing by Agnes Schneider, and that the same may be used in any of the cases now pending, or hereafter commenced, in the United States District Court for the District of Minnesota, in which the United States is plaintiff, involving the conveyance or incumbrance of lands upon the White Earth Indian Reservation.

95 (Testimony for Defendant.)

MR. C. F. HAUKE, being first duly sworn, testified as follows:

Mr. Powell:

Q. Your full name is what, Mr. Hauke?

A. Charles F. Hauke.

Q. You reside in the City of Washington?

A. In the City of Washington.

Q. What official position do you occupy in the Bureau of Indian Affairs?

A. I am Second Assistant Commissioner.

Q. How long have you occupied that position?

A. Since July, 1910.

Q. How long have you been connected with the Bureau of Indian Affairs?

A. Thirteen years, past.

Q. What position did you occupy during the years, commencing January 1, 1906, down to the date of your appointment as Second Assistant Commissioner?

A. Well, in 1906, and up to about April, 1907, I was a clerk of the fourth grade, handling more particularly right of way matters and also the sales of inherited Indian lands. In 1907, April 16, 1907, I was appointed Chief of the Land Division, which position I held until 1909. About April, 1909, I was appointed Chief Clerk, which position I held until July 1, 1910, at which time I was appointed Second Assistant Commissioner, with the duties of Chief Clerk.

Q. In any of those positions which you have named, did you have anything to do personally with the matter of issuance of fee simple patents to Indians on the White Earth Reservation under the provisions of the so-called Clapp Act of June 21, 1906, and March 1, 1907?

A. As Chief of the Land Division, between 1907 and 1909 I passed the letters coming from the Land Division, which division handled the matter of issuance of fee simple patents to the White Earth Indians under the Clapp Act.

Q. Are you familiar with the method that was adopted by the office pursuant to the acts above mentioned relative to the form of applications to be submitted to this office by various applicants for fee simple patents on the White Earth Reservation? A. I am in a general way.

96 Q. Do you know, Mr. Hauke, whether or not any letter of instructions was issued by this office to Mr. Michelet, the Agent at the White Earth Agency, after the passage of the Clapp Act, June 21, 1906, covering the method to be pursued in the matter of applications for fee simple patents?

A. I know of no specific instructions; that is to say, detailed instructions, telling how these applications should be framed, formed and submitted.

Q. I will show you a package of tissue-paper copies of letters, Mr. Hauke, and I will ask you to identify that, [of] you will, as a record of this office, so that we can refer to it in the future. That is one of the files of this office?

A. Yes, this is the file of the press copies of the letters prepared in the office and sent out. This particular letter is one which bears my signature.

Q. This tissue-paper copy, or letter-press copy of the letter of November 19, 1910, addressed to E. H. Long, Special Assistant to the Attorney General, and J. H. Hinton, Special Indian Agent, Detroit, Minnesota, may be deemed for identification marked Exhibit 'A', and it is stipulated that copy of the same may be made and attached to the record. I will show you, then, Mr. Hauke, the letter referred to, marked Exhibit 'A', and ask you if that is a copy of the letter.

A. Yes.

Q. Did you sign the letter as 2nd Assistant Commissioner?

A. Yes.

Q. That letter, Mr. Hauke, refers to a letter of October 6, 1910, as having been received from the gentlemen named, Messrs. E. H. Long, Special Assistant to the Attorney General, and J. H. Hinton, Special Indian Agent, which may be for identification marked Exhibit 'B'. I will show you Exhibit 'B', Mr. Hauke, and ask you if that is the letter which was received by this office from Messrs. Long and Hinton.

A. It is.

Q. So far as you know, Mr. Hauke, these two letters, which have been identified as exhibits 'A' and 'B', constitute the only opinions of this office on the subject of what constitutes a mixed blood? A. I believe they do.

Cross-Examination

By Mr. Cain:

Q. Mr. Hauke, the letter prepared by you and marked Exhibit 'A' was in response to a letter received from Messrs. Long and Hinton upon the same subject, and is this letter
97 marked Exhibit 'B' here? A. Yes.

Q. This was in 1910, as shown by the letter itself?

A. Yes.

Q. Prior to the writing of that letter, Mr. Hauke, had you at any time ever given an opinion as to the construction of of the Clapp Act insofar as it relates to the term "mixed bloods"?

A. I do not recall of an opinion ever having been made by the Indian Office determining what constitutes a mixed blood.

Q. In determining finally what the construction of the term mixed blood should be, would that devolve upon you alone, or would it go to the Commissioner, and perhaps to the Secretary's office?

A. It would go to the Secretary's office.

Q. Do you consider an opinion by yourself or any one in the Indian Bureau as conclusive upon the department in its construction of an act or law? A. No, sir, I do not.

Q. Was this letter ever to your knowledge passed upon by the Secretary's office?

A. It was not to my knowledge.

Q. The letter indicates, Mr. Hauke, that something further was to be done upon this matter before a final determination was made.

A. In the last paragraph of the letter it is stated that a representative of the Indian Office would be sent to the Department of Justice to confer regarding the questions presented by Messrs. Long and Hinton, and that after such conference they would be advised further. I do not recall that they were ever further advised.

Q. This letter, then, as it appears, is not final instructions from this Bureau upon that point, is it?

A. No, it was not intended to be specific instructions.

Q. In the practical application for administration of the Clapp Act, was the question of what constitutes a mixed blood ever raised before you prior to this time, if you know?

A. The question was never submitted to me for decision in any way.

98 Q. Did you ever issue any instructions to anybody in this office here, or to any agents in the field, as to what construction was to be placed upon the term "mixed bloods" as incorporated in the Clapp Act?

A. I do not recall any such.

Redirect Examination

By Mr. Powell:

Q. The letter referred to as Exhibit 'A' states that the office is inclined to the view that the term should be construed in a certain manner. Is it not a fact, Mr. Hauke, that without any formal action upon the question, it has been assumed by your office in all of its dealings with regard to White Earth matters since the passage of the Clapp Acts that the term "mixed bloods" included any person who had any amount of blood other than Indian blood?

A. This letter seems to be the closest approach to the expression of any office views as to what constitutes a mixed blood, but, as I said before, it was not final, nor was it intended as specific instructions.

Q. But it did express, did it not, the office opinion as understood by yourself at that time?

A. It expressed, I might say, the undigested view of the office.

Recross Examination

By Mr. Cain:

Q. In your consideration of the term "mixed bloods", when this question was before you at the time this letter was written,

what class of people was in your mind at that time as constituting mixed bloods?

A. Why, the class of people that were akin to the Beaulieus and the mixed bloods that were sent from White Earth.

Q. Did you at that time contemplate the gradation of blood down to what we denominate a mere strain of white blood?

A. I did not realize that the question might go that far. We had no realization of the extent to which the question might reach.

99 MR. J. F. ALLEN, being first duly sworn, testified as follows:

Mr. Powell:

Q. What is your full name, Mr. Allen?

A. James F. Allen.

Q. You reside in the City of Washington, Mr. Allen?

A. No, I reside in the town of Rockville, Maryland.

Q. How long have you been in the Indian office?

A. Thirty years and six months.

Q. Were you in the Government service prior to the time when you entered the Indian service?

A. I was in the Treasury Department, and about a year in the War Department.

Q. During the years commencing with the year 1906, what position did you occupy in this office?

A. Well, during the year 1906, and until the 15th of April, 1907, I was Chief of the Land Division.

Q. That division has charge of what particular branch or branches of the Indian service?

A. Well, it has quite an extensive range of subjects. Not to express all of it, but the principal ones, it has the allotment of lands in severalty, the sale of inherited lands and other lands authorized by law, the leasing of Indian allotments,—

Q. Does it include the issuance of patents?

A. The issuance of fee simple patents.

Q. Does it also have charge of the issuance of trust patents?

A. It has charge of the allotments, and recommends the schedule of allotments for the approval of the Secretary, and directs the Commissioner of the General Land Office to issue trust patents for the lands embraced in the schedule.

Q. You were then the Chief of the Land Division in this office at the time of the passage of the so-called Clapp acts of 1906 and 1907, March 1, 1907? A. Yes, sir.

100 Q. Did you have anything to do with the matter of issuing fee simple patents under those acts to Indians on the White Earth Reservation?

A. The applications, or letters, as they came in were, under the practice at that time, charged by me to the clerk having charge, who prepared the letters, etc., and they were submitted for my review and initialed by me if I approved.

Q. Did you have anything to do with the preparation of the forms of applications and proofs upon which those fee simple patents were issued?

A. I do not recollect that I did.

Q. It would be natural, would it not, if such forms of proofs were prepared in this office that it would be done by you or under your direction as chief of that division?

A. Yes, sir.

Q. We may understand then, may we not, Mr. Allen, that these forms as adopted by the agent in the field and used by him and transmitted to this office were not originated here?

A. That was my belief. The fact is, I do not think there were many applications for patents received before April, 1907.

Q. After you ceased to be Chief of the Land Division in the office, what position did you occupy?

A. A new division was created called the Field Work Division and I was placed in charge of that.

Q. Did your duties as chief of the Field Work Division include the matter of issuing fee simple patents?

A. No, sir, that still remained with the Land Division.

Q. Did you ever after that time have anything to do with passing upon applications for patents from the office at White Earth?

A. Several years later, I forget the exact date though, the Board of Reviews was established here, I think in 1909, and I was made Chairman of that Board. The letters which passed the different divisions were sent in for review, and as chairman I passed upon the letters recommending the issuance of fee simple patents to the White Earth mixed bloods.

Q. Do you recall the form, in substance, of the application and proofs which were submitted and upon which this office recommended the issuance of fee simple patents in various cases coming under your notice?

101 A. The principal thing I remember about these applications is that they were passed upon by Mr. Long and Mr. Hinton. They had a sort of form letter,—“We find that John Smith is an adult mixed-blood Indian of the White Earth Reservation who has made application for a fee simple patent and we recommend that it be issued.” That is the substance, and I passed them principally on Mr. Long and Mr. Hinton's statement and recommendation.

Q. It appears, Mr. Allen, that the applications and proofs upon which fee simple patents were issued on the White Earth

reservation, uniformly prepared and submitted to this office, including the recommendations of Messrs. Long and Hinton, referred to the applicant as an adult mixed-blood Chippewa Indian?

A. Following the language of the Act.

Q. Following the language of the Act? A. Yes.

Q. No question, so far as you know, was ever raised by the divisions of which you were in charge, including the Board of Review, with regard to the inefficiency of such a showing and the absence of any suggestion as to the amount of foreign blood which the applicants might possess?

A. I do not recall that there was any question raised as to the quantity.

Q. You were present here when we were discussing with Mr. Hauke the office letter to Messrs. Long and Hinton in answer to their letter, which two letters have been marked exhibits 'A' and 'B'? A. Yes.

Q. In that letter it is stated that "this office is inclined to the view that the words and expressions (referring unquestionably to the words mixed blood) are to be construed in their ordinary meaning." A. Yes.

Q. State whether or not that letter correctly expresses the attitude of the office, so far as you understand it, touching the construction by this office of the term mixed blood.

A. Well, it expresses the view of the office held at the time without any exhaustive examination of the question.

Q. You have been in the office a long time, Mr. Allen. Were you ever called upon to have anything to do with the issuance of scrip to Chippewa Indians under the Treaty of September 30, 1854, known as the La Pointe Treaty?

A. I never had anything to do with the issuance of that scrip.

102 Q. Are you familiar with the construction placed upon the term mixed blood by this office in relation to the terms of that Treaty, where it is used?

A. That was done before I came here. I am not familiar with it.

Cross-Examination

By Mr. Cain:

Q. Mr. Allen, was this question of what constitutes a mixed blood ever before you definitely upon the application of any particular Indian for his allotment?

A. Not to my recollection.

Q. Then when you recommended or passed the recommendation for the issuance of fee simple patents, you never at any time decided whether or not the particular applicant was a mixed blood under the terms of the Clapp Act as you found it in

the application. When you say that that was the opinion of the office generally, do you mean the official opinion of this office as being practically applied, or do you mean the individual opinion of different members of the office?

A. Well, I think it becomes the opinion of the office when it is signed by the signing official.

Q. Who would that be?

A. In this case it was Mr. Hauke, 2nd Assistant Commissioner.

Q. That opinion of Mr. Hauke as indicated in the letter here was subject to review? A. Certainly.

Q. In your knowledge, was that view of the Clapp Act ever carried out by Messrs. Long and Hinton to whom that letter was addressed?

A. I am not advised as to that.

Q. You do not know whether Messrs. Long and Hinton recommended fee simple patents no matter what the quantum of white blood, or whether it required that there be a certain quantum of Indian blood? A. I do not.

Q. So that this is really, if at all, the theoretical opinion of the office in regard to this. A. It is.

103 Q. When applications came to you accompanied by affidavits stating that the applicant was an adult mixed blood, you simply passed them as coming under the terms of the Clapp law? A. Yes.

Q. You did not profess to interpret or construe the law, but the proof in terms brought them under the law, and you let it go at that? A. Yes.

MR. R. G. VALENTINE, being first duly sworn, testified as follows:

Mr. Cain:

Q. Your full name Mr. Valentine?

A. Robert G. Valentine.

Q. What is your official position?

A. Commissioner of Indian Affairs.

Q. How long have you held that position?

A. Since June, 1909.

Q. Since the day in which you took that position have you ever at any time given an official construction of the term "mixed blood" as used in the Clapp Act?

A. Not to my recollection.

Q. You have not done so at least in your own personal conduct? A. No, never.

Cross-Examination

By Mr. Powell:

Q. Were you in the office prior to your appointment as Commissioner? A. Yes.

Q. How long have you been connected with the Indian Office?

A. I have been connected with the office since March, 1905.

Q. What were your duties prior to your appointment as Commissioner?

A. I was first private secretary to the Commissioner at that time and held that until I was appointed Assistant Commissioner on the 1st of December, 1908.

104 Q. During none of that time did you have personal charge of the matter of the administration of the affairs, under the Clapp Act, on the White Earth Reservation?

A. At no time until I became Assistant Commissioner in 1908.

Q. Then did you have anything to do with the issuance of patents?

A. I do not doubt that a great many of them came over my desk because much of the time that I was Assistant Commissioner I was also acting Commissioner, Mr. Leupp being away part of the time.

Q. Do you happen to remember whether Mr. Leupp visited the White Earth Reservation after the passage of the Clapp Act of June 21, 1906? A. I do not know.

Q. You do not remember? A. No.

Q. Would the office records show whether or not he so visited the reservation?

A. I think they probably might, because of correspondence, —letters he might have written from there.

Q. I think Mr. Leupp testified. A. Yes.

(Stipulation waiving Signatures of Witnesses and Certificate of Notary, etc.)

It is stipulated and agreed by and between counsel of the respective parties that the signatures of the foregoing witnesses to this evidence, together with the certificate of the Notary before whom they were sworn, be waived, and

It is further stipulated that all the testimony on the part of the defendants is subject to the general objections that the same is incompetent, irrelevant and immaterial, and all objections to the admissibility of any of the evidence so taken, except as to the form of the questions asked, are reserved, and that such objections may be taken upon the statement of this case to the

Court in the same manner and to the same effect as though the witnesses were under examination in open court.

105

(Exhibit 'A')

Copy.

1-2375

Land-

Contracts

S1153-1910

Department of the Interior

J G D

Office of Indian Affairs,

Meaning of the
term "Indian."

Washington,

Nov. 19, 1910.

Hon. E. H. Long, Special Assistant to the Attorney General,
and Mr. J. H. Hinton, Special Indian Agent,
Detroit, Minnesota.

Gentlemen:

Your letter of October 6, 1910, containing a discussion on and regarding what quantum of blood constitutes an Indian or full-blood among the Chippewas, particularly as applied to allottees of the White Earth Reservation, Minnesota, has been received and has been given careful consideration.

In accordance with the suggestion contained in the closing paragraphs of your letter, action has been suspended on all applications for patents in fee reported upon by you thus far until the further light is had on the term "Indian" in law, and until the legal meaning of the term "mixed blood" shall have been established.

It is noted that the treaties of 1837 and 1842 (11 Kappler 192 and 543, respectively) refer to the half-breeds of the Chippewa Nation as "their half-breed relations." Article 4 of the

Treaty of 1847 (11 Kappler 568) stipulates that the "half
106 or mixed bloods of the Chippewas" shall be considered

Chippewa Indians and as such allowed to participate in the payment of annuities.

It appears from the provisions of these treaties that the persons referred to as half-breeds or mixed bloods or those of less than the half-blood were not recognized by the Chippewas as Indians. Such persons were given their status in so far as it appertained to benefits with the tribe by certain special provisions in the Chippewa treaties.

The only declaration by the Congress that the Office has found regarding the term "Indian" is contained in the Act of February 6, 1909 (35 Stat. L. 600), as referred to in your letter. This provision of law reads:

That the term "Indian" in this act shall be construed to include the aboriginal races inhabiting Alaska when annexed to the United States, and their descendents of the whole or half-blood, who have not become citizens of the United States.

The question of what is an "Indian" arose in the Indian Office during the fiscal year ending June 30, 1892, in the case of Black Tomahawk, a full blood Sioux Indian, and Mrs. Jane E. Waldron, a woman of mixed Sioux Indian and white blood, wherein both claimed a specific tract of land as their allotment under Section 13 of the Act of March 2, 1889 (25 Stat. L., 888, 892), sometimes referred to as the Great Sioux Act. Under the provisions of the Great Sioux Act, Mrs. Waldron a quarter-
107 blood Santee, established her residence on a certain tract of land near the City of Pierre, South Dakota, in the month of July, 1889, and Black Tomahawk established his residence on the same tract in the same month and year.

The Assistant Attorney General of the Department of the Interior, to whom the case was referred, rendered an opinion under date of November 27, 1891, that Mrs. Waldron is not an Indian and was not at the date referred to entitled to receive rations and annuities at the Cheyenne River Agency, on the ground that the common law rule "that the offspring of free persons follows the condition of the father prevails in determining the status of children born of a white man, a citizen of the United States, and an Indian woman, his wife; * * * children of such parents are therefore by birth not Indians, but citizens of the United States, and consequently not entitled to allotments under the Act of March 2, 1889." (Vol. 13, Department Decisions, page 683.)

Mrs. Waldron, however, instituted an action in the United States Court for the District of South Dakota. This was decided on July 1, 1905, the case being that of Waldron v. United States et al (143 Fed. Rep. 413). The Court held that Mrs.

Waldron was an Indian within the meaning of the act,
108 and the head of a family according to the laws and usages of her tribe, her husband being a white man, and as such was entitled to the allotment and to a cancellation of the patent therefor issued to defendant (Black Tomahawk.)

The third paragraph of the syllabus of the opinion recites that:

In an action brought under Act Feb. 6, 1901, c. 217, 31 Stat. 760, which gives to a person in whole or in part of Indian blood or descent the right to bring such action to establish the right to an allotment of land by virtue of an act of Congress, which he claims to have been unlawfully denied him, the decision of

the Land Department, upon the question whether or not the plaintiff when a person of mixed blood was recognized as a member of the tribe entitled to the benefit of the act, will not in all cases be followed, since in case of an adverse ruling such rule would leave the plaintiff without the remedy which it was the purpose of the statute to give him.

The Indian Office submitted to the Department of the Interior under date of March 17, 1892, a special report upon the subject of what constitutes an Indian. The matter appears to have been gone into at great length at the time, and as the census of the Chippewas contemplated in 25 Stat. L., 642 is specifically referred to in the special report and mentioned by you in your letter, a copy of the report is herewith
109 transmitted for your further information.

Mr. Attorney General Cushing expressed the opinion under date of July 5, 1856 (7th A. G. Ops. 46), that half-breeds—and he appears to have used the expressions "half-breeds" and "mixed bloods" interchangeably—should be treated as Indians in all respects so long as they retain their tribal relations.

The question of membership in the Choctaw and Chickasaw Nations was settled by a Citizenship Court created by 32 Stat. L., 646, which law conferred upon such court exclusive jurisdiction in the matter. A suit arose under this provision of law in a case entitled *Dawes v. Cundiff* (Indian Territory 1904), reported in 82 S. W., 228.

The question of mixed bloods pertinent to your suits and inquiries regarding the Chippewa Indians of the White Earth Reservation relates specifically to the term "mixed blood Indians" as used in the Act of June 21, 1906 (34 Stat. L., 325, 353), which act of the Congress removed the restrictions from the adult mixed blood Indians of the White Earth Reservation. The question of the status of mixed bloods which commonly arises in the case of offspring of a white father and an Indian mother, and sometimes, but rarely, in the case of a white mother and an Indian father, has been the subject of conflicting decisions of the courts. The weight of authority appears
110 to be, adopting the common law rule, that the child follows the condition of the father. See the following cases: *Keith v. United States*, 8 Okla. 446, 58 Pac. 507; *United States v. Higgins*, 110 Fed. Rep. 639; *United States v. Hadley*, 99 Fed. Rep. 437; *United States v. Ward*, 42 Fed. Rep. 320; *Ex parte Reynolds*, 5 Dillon 394.

The Act of the Congress of June 7, 1897 (30 Stat. L. 990), provides that children born of a marriage solemnized between a white man and an Indian woman by blood and not by Adop-

tion, where the Indian is recognized or was recognized at the time of her death by the tribe, shall have the same rights and privileges to the property of the tribe to which the mother belongs or belonged at the time of her death by blood, as any other member of the tribe.

In Canada a person of Indian blood from either parent is regarded as in Indian, although the mother may have lost her status as an Indian by her marriage. *Reg. v. Howson*, Terr. L. R. 492.

The term "mixed bloods" as used in treaties and statutes appears to include persons of half or more or less than half Indian blood derived either from the father or from the mother, and such persons, if they live with the tribe, are "Indians." See the cases of *Wall v. Williams*, 11 Ala. 826; *Sloan v. U. S.*, 118 Fed. Rep. 283; *Farrell v. U. S.*, 110 Fed. 942, 49 C. C. A. 183; and *Sloan v. U. S.*, 95 Fed. 193.

111 In Indians by legislative definition the word "Indian" includes all persons of Indian descent recognized as members of any tribe residing in that State down to those having one-eighth Indian blood. (*Doe v. Aveline*, 8 Ind. 6.)

It was decided in the case of *Lane vs. Baker* (12 Ohio 237) that youths of Indian, negro and white blood, but of more than one-half white blood, are white persons.

In the case of *Campan v. Dewey* (9 Mich. 381) it was decided that "Indians by descent" is a term applicable both to those of the full-blood and of mixed white and Indian blood.

After all, are not the expressions "full-bloods" and "mixed-bloods" as used in the acts of the Congress of June 21, 1906 (34 Stat. L., 325, 353), and March 1, 1907 (34 Stat. L., 1015), to be interpreted and construed in the light of the ordinary every-day meaning of such words and expressions, without attempting to give a technical or extravagant interpretation, and thus perhaps substitute a meaning evidently beyond the true one intended by the Congress? The Office is inclined to the view that the words and expressions are to be construed in their ordinary meaning, and that this interpretation and construction is more reasonable and plausible than to hold that the term "full-bloods" includes those of the admitted pure blood and others above the half-blood.

112 In view of the provisions of the treaties cited, however, it can be easily seen that by an artful interpretation the term "full-bloods" can be said to include those Indians not admittedly pure blood down to and including all above the half-blood.

The view inclined to by the Office is further strengthened by the definitions of the several expressions as contained in one of the standard dictionaries. "Full-blood" is defined by the Century Dictionary (Edition 1900, Vol. III, p. 2402) "as an individual of pure blood," while the word "mixed" is defined (id. Vol. V, p. 3806) as "consisting of different elements or parts." "Half-blood" is defined (id. Vol. V, p. 2686) as a person "belonging by blood half to one breed or race, and half to another." "Half-breed" is defined (id. Vol. IV, p. 2687) as "one who is half-blooded; one descended from parents or ancestors of different races; specifically applied to persons descended from certain races of different physical characteristics, as the off-spring of American Indians and whites. In this expression persons with any perceptible trace of Indian blood, whether mixed with white or with negro stock, are popularly included."

In accordance with your joint request,—a representative of this Office will be sent to the Department of Justice to confer regarding the questions presented by you, and after such conferences you will be advised further.

Very respectfully,

C. F. HAUKE,

10-CAS-25

Second Assistant Commissioner.

F

113

(Exhibit 'B')

(Copy)

File 81153-1910

Recd. 10-10-1910

Department of Justice,
Washington, D. C.

Detroit, Minnesota,

Oct. 6, 1910.

The Commissioner
of Indian Affairs.

Sir:

In the respective bills of complaint filed in the Circuit Court of the United States for the District of Minnesota (Sixth Division), in Equity, to recover the lands involved and quiet title thereto, the term Indian, when reference is made to the allottee, is always used. In no part of the bill is the term or expression, "Full Blood" or "Mixed Blood" used. It becomes a matter of importance to determine who is an Indian, or what quantum of blood constitutes an Indian; in other words to whom in law, not in science or anthropology, shall the term mixed blood be applied?

In the Act of February 6, 1909 (35 Stat. L., 600-603), Congress defines the term "Indian", and declares that the term in the Act, shall be so construed as to include the aboriginal races inhabiting Alaska when annexed to the United States, and their descendants of the whole or half blood. This Act
114 relates to offenses against public policy, such as selling liquor or firearms to an Indian of half-breed who lives and associates with the Indians.

It appears from an examination of the treaties with the Chippewas that half-breeds or persons of less than the half blood were not regarded as Indians or members of the Chippewa Nation. The half-breeds were recognized by the Nation or tribes thereof as a separate and distinct class.

Article 3 of the treaty of 1837 (Kappler's Laws and Treaties, Vol. 2, p. 492), is as follows:

"The sum of one hundred thousand dollars shall be paid by the United States, to the half-breeds of the Chippewa Nation, under the direction of the President. It is the wish of the Indians that their two Sub-Agents, Daniel P. Bushnell, and Miles M. Vineyard, superintend the distribution of this money among their half-breed relations."

The treaty of 1842 (Kappler, Vol. 2, p. 543), contains this paragraph in Article 4:

"Whereas the Indians have expressed a strong desire to have some provision made for their half-breed relations, therefore it is agreed that fifteen thousand (15,000) dollars shall be paid to said Indians (persons), next year, as a present, to be disposed of, as they, together with their Agent, shall determine in Council."

Article 4, of the treaty of 1847 (Kappler, Vol. 2, p. 568), stipulated thus:

115 "It is stipulated that the half or mixed bloods of the Chippewas residing with them shall be considered Chippewa Indians, and shall, as such, be allowed to participate in all annuities which shall hereafter be paid to the Chippewas of the Mississippi and Lake Superior, due them by this treaty, and by the treaties heretofore made and ratified."

Article 5, of the treaty of 1855 (Kappler's Vol. 2, p. 689), contains this paragraph:

"And such of the mixed bloods as are heads of families, and now have actual residences and improvements in the ceded country, shall have granted to them, in fee, eighty acres of land, to include their respective improvements."

Article 4, of the treaty of 1867 (Kappler, Vol. 2, p. 975), provided that:

"No part of the annuities provided for in this or any former treaty with the Chippewas of the Mississippi bands, shall be paid to any half breed or mixed blood, except those who actually live with their people upon one of the reservations belonging to the Chippewa Indians."

From the provisions in the treaties mentioned above, it will be observed that the persons classed as half-breeds or mixed bloods, or those of less than the half blood, were not recognized by either the Chippewas or the Government, as Indians and entitled to all the rights and privileges of the Chippewas or Indians. Such persons acquired tribal money, annuities and tribal lands, or allotments in such lands, by special provisions of the treaties as shown above.

116 The Act of June 14, 1889 (25 Stat. L., 642), provided for the appointment by the President, of three Commissioners, to negotiate with all the different bands or tribes of Chippewa Indians in the State of Minnesota for the cession and relinquishment in writing of all their title and interest in and to all the reservations in said State, except the White Earth and Red Lake Reservations, * * *; And that such cession and relinquishment should be deemed sufficient as to each of said reservations, except as to Red Lake, if made and assented to in writing by two-thirds of the male adults over 18 years of age of the band or tribe of Indians occupying and belonging to such reservations, and as to the Red Lake Reservation, the cession and relinquishment should be deemed sufficient, if made and assented to in like manner by two thirds of the male adults of all the Chippewa Indians in Minnesota.

And for the purpose of ascertaining whether the proper number of Indians yielded and gave their assent as aforesaid, this Act provided also that the said Commissioners should, while engaged in securing such cession and relinquishment and before completing the same, make an accurate census of each tribe or band, classifying them into male and female adults, and male and female minors; and the minors into those who were orphans and those who were not orphans. Such

117 census was made. The cessions and relinquishments were made as provided for, and the agreements, approved by the President.

It does not appear that this Act last named, classified the Chippewas into Indians, half-breeds or mixed bloods, but into male and female adults, and male and female minors, and minors into orphans. Assent to the cessions of lands was

required, of two thirds of the male adults over 18 years of age belonging to or occupying the respective reservations, and not of Indians, or of half breeds or mixed bloods. It would seem from this Act that a white man if legally adopted into the tribe, and if he belonged on and occupied a part of some reservation involved, would have had the right to sign the agreement of cessions.

The Act does not define the term Indian or classify the people into Indians, or half breeds or mixed bloods. It would seem therefore, that the provisions of the treaties above mentioned, ratified and proclaimed as they were, would govern in the matter of determining who are Indians and who are not; also, as to who are mixed bloods, the latter embracing persons who are of the half or less of Indian blood.

118 It is understood that the Department of Justice is inclined to this view of the matter, and that in all probability the Attorneys for the Government will so contend when the White Earth reservation land cases now pending in the United States court of the district mentioned, come up for hearing.

In this connection your attention is respectfully invited to Section 5 of the Act of June 25, 1910 (Public, No. 313), providing that it shall be unlawful for any person to induce [and] "Indian" to execute any contract, deed, mortgage, or other instrument purporting to convey any land or interest therein, held by the United States in trust for such Indians, etc.

In due course, we shall examine the records of Becker, Clearwater and Mahnomen Counties for the purpose of ascertaining whether any contract, deed, mortgage or other instrument has been executed by an allottee of the White Earth reservation conveying since June 25, 1910, any land or interest therein held in trust.

The importance of construing or defining the term "Indian" is seen again here.

Moreover, we are planning for Special Agent Hinton to accompany the Superintendent of the White Earth Reservation, when the latter makes his annuity payments thereon, for the purpose of procuring additional data and information preliminary to the making of a status roll of the allottees of the reservation. The party expects to begin the work indicated about Oct. 12, 1910. If the term Indian or Full Blood, and the term mixed blood had been legally defined, the task of fixing the status of the White Earth allottees would be simplified.

However, the Special Agent will, so far as it may be possible to do so, fix the degree of Indian blood in each allottee, that is, $1/16$, $1/8$, $1/4$, $1/2$, $3/4$ or $4/4$ as the case may be. He will also take a statement from each allottee whose status has not already been fixed, claiming to be a full blood and wishing an opportunity to prove it, if necessary. With the information thus procured, it will be seen that a roll can be prepared, indicating the degree of blood, or one simply of "Full Bloods", and another of "Mixed Bloods."

We shall be pleased to have you take up with the Department of Justice, the matters herein discussed, reach some conclusion as to what quantum of blood constitutes an Indian or full blood among the Chippewas, or mixed bloods among that tribe, that is, whether persons of the half blood and
120 more, should be regarded as Indians or full bloods under the law, and persons of less than the half blood be denominated mixed bloods.

This is an important question to us in making a status roll of the White Earth reservation allottees and in prosecuting the suits already filed and to be filed, and such action as may arise under section 5 of the Act of June 25, 1910, above referred to. We therefore feel warranted in suggesting that you confer with the Department of Justice as to the questions presented, and in asking your views thereon.

We have reported favorably the applications of 118 persons for patents in fee simple on the ground that they are mixed bloods. The quantum of Indian blood was not determined; but it is thought that most of them are of the half blood or less. Doubtless it would be wise to suspend action on all applications for patents in fee reported thus far by us, until further light is had on the term "Indian" in law, and the legal meaning of the term Mixed-blood. We make recommendation accordingly.

If the person having half Indian blood or more is to be classed as an Indian, or legal full blood and one have
121 less than half Indian blood is to be classed as a mixed blood in law, the cases thus far reported can be easily disposed of after the return of the Special Agent from his tour of the reservation, for he expects to see most of the applicants at that time. He expects also to see all other persons whose applications for patents in fee are pending here, fix their status, examine them as to their signatures to the applica-

tions, and report them to the office as rapidly as the pressing duties of our work will permit.

Very respectfully,

E. H. LONG,

Spl. Asst. to the Atty. General,

J. H. HINTON,

Special Indian Agent.

JHH/MW

122 (Defendant's Exhibit 3, Stipulation as to Testimony of Simon Michelet and George A. Morrison, etc.)

It is Hereby Stipulated and Agreed by and between the respective parties to the above entitled cause, by their Solicitors and Counsel,—

That Simon Michelet, if called as a witness on behalf of the defendant, would testify that he was Indian Agent at White Earth for several years prior to the date of the passage of the Act of June 21st, 1906, commonly known as the Clapp Act, and continued as such agent until about the 1st day of June, 1908. During all of that period he resided at White Earth and was in daily communication with the Indians under his charge, and made numerous trips over the Reservation, making payments and looking after Indian affairs. Soon after the passage of the Act of June 21st, 1906, he went to Washington for the purpose, among other things, of consulting the Commissioner of Indian Affairs regarding the method to be pursued by his office in receiving and passing upon applications for fee simple patents under the provisions of the said Act of June 21st, 1906, and also to ascertain the construction to be placed upon the term "mixed-blood," as used in the said Act. He was referred by the Commissioner to the Lands Division in the Indian Office, and particularly to a Mr. Good, who was repre-

123 sented to be in charge of those matters, and who is no longer in the Indian service, but resides at Shawnee, Oklahoma. He discussed the situation with Mr. Good and agreed upon the method which was afterwards followed by the Agency office, so long as he occupied it. This method was to require an application by the allottee for a fee simple patent to be accompanied by the affidavit of two members of the tribe, that the applicant was an adult mixed-blood Chippewa Indian. At this discussion it was further agreed that the Act did not require a showing of any definite quantum of foreign blood to constitute a mixed-blood, but that the term included any adult allottee who could be shown to have an admixture of Chip-

pewa and White blood. So far as his observation went this was the construction generally adopted by those who dealt with the Indians on the White Earth Reservation. He does not recall any particular person who inquired of him regarding the office construction of the Act in that respect, but does recall having been spoken to about it. How many times he cannot say.

In his association with the Indians he observed that those who had or were reputed to have some white blood, while not in all cases more frugal than those who were classed as full-bloods, were generally more industrious. They seemed to acquire the white man's methods quicker, and, while they might squander money just as readily, they took to work quicker, and seemed to have greater capacity to find ways and means to care for themselves, under the changed conditions brought about by the loss of their old life as hunters and trappers. He further observed that the effect of this infusion of white blood upon the character of the individual was not in proportion to the amount of white blood reputed to be in his veins, for often a person having half or more of white blood, exhibited less competency, both in the acquisition and care of property than was shown by others who were close to the line. On the other hand, some were observed to be of unusual capacity in that respect, whose strain of white blood appeared to be very slight. He also found some reputed full-bloods who had developed the capacity to work and care for their property.

124 It is Further Stipulated that George A. Morrison, if called as a witness on behalf of the defendant would testify that he is a white man and resides near Ogema on the White Earth Reservation. For many years, commencing in 1869, he was an Indian trader, having stores at Leech Lake, Red Lake and White Earth. He was born in 1839, and first became associated with the Chippewa Indians at Fond du Lac in 1858. At that time, and long prior thereto, his two uncles, Allen and William Morrison, were and had been engaged in trading with these Indians. After he quit the business he worked for a few years as clerk in the Indian Office at White Earth, and is now farming near Ogema. He has resided continuously among the Chippewas since 1858, and, while he did not deal in Indian lands to any extent, after the passage of the Act of June 21st, 1906, he is very familiar with the conditions as they existed among the Indians during all of those years. In the early period of his association with these In-

dians the terms "mixed-blood" and "half-breed" were almost synonymous, as used by the white people of Minnesota and Wisconsin, and the term "half-breed" was generally applied to one of mixed white and Indian blood, regardless of the percentage of mixture one way or the other. Later the term "mixed-blood" became more commonly used, and "half-breed" was used to indicate one having nearly half and half of white and Indian blood. The Indians at that time generally made no distinction as to the extent or quantum of the mixture of white and Indian blood in an individual, but classified him as an Indian, if he lived with them as one of them and adopted their habits and mode of life, or as a half-breed, if he adopted the white man's mode of life. It was the mode of life and not the percentage or character of the mixture which, among these Indians, generally, governed the designation of the individual.

During his many years among these Indians he observed that those who, while living and hunting as Indians, had descended from white men, were more active and better hunters.

125 The pure Indian ordinarily would do no more than was necessary to meet his own immediate needs, while the strain of white blood in one of them manifested itself in a disposition to acquire something for the future. The Indians generally would quit hunting and trapping and come back to headquarters, when they had caught enough skins to pay what they owed the trader, while the mixed-blood would be apt to continue his hunt until the end of the season, although the surplus proceeds might soon be squandered after his return. This difference in capacity did not seem to be dependent upon the amount of white blood the particular Indian might have.

It is further agreed that such statements may be treated by the court the same as though made under oath, upon the witness stand, subject, however, to objection made by counsel for the plaintiff that the same are immaterial, irrelevant and incompetent, but no objection is made to the manner of introducing this testimony into the record.

CHAS. C. HOUP,.
Solicitor for Complainant.

M. C. BURCH,
Counsel for Complainant.

R. J. POWELL,
Solicitor for Defendant.

MAPS

TOO

LARGE

FOR

FILMING

127

(Defendant's Exhibit 5.)

List Showing the Decree of Indian Blood of Certain Persons Holding Land upon the White Earth Reservation in Minnesota

and a

List Showing the Date of Death of Certain Persons who Held Land upon such Reservation.

Department of the Interior.

Washington, Government Printing Office 1911.

Decree of Indian Blood of Persons Holding Land on the White Earth Reservation, Minn.

Persons of less than 4/4 Indian blood, and degree of Indian blood of each person.

Allotment numbers.		Indian names.	English names.	Sex.	Degree of blood.
Original.	Additional.				
* *	* *	* * * * *	* *	* *	* *
3459	1934	Ay-nah-be-quay		F.	5/8
* *	* *	* * * * *	* *	* *	* *
4721	2332	Bay-baum-e-go-zhig-o-quay		F.	25/32
* *	* *	* * * * *	* *	* *	* *
4720	2973	Equay way aun		F.	7/8
* *	* *	* * * * *	* *	* *	* *
240	167	Kay-zhe-baush-kung	Big Bear,		
			Peter	M.	31/32
* *	* *	* * * * *	* *	* *	* *
242	166	Kah-go-je-we-gwon	Big Bear,		
			William	M.	31/32
* *	* *	* * * * *	* *	* *	* *
2239	1632	Mosh-kin-ay-yaush		M.	15/16
* *	* *	* * * * *	* *	* *	* *

128

Allotment numbers		Indian names.	English names.	Sex	Degree of blood.
Original	Additional				
1786	1314	Ne bin ay ge shig		F.	15 16
" "	" "	" " " " " "	" "	"	" "
4926	2985	Pah-dub-e-ge-shig		M.	1/2
" "	" "	" " " " " "	" "	"	" "
4716		Quay-koonce	Daily, William	M.	31 32
" "	" "	" " " " " "	" "	"	" "
1549	1200	" " " " " "	Roy, Mary	F.	3 8
" "	" "	" " " " " "	" "	"	" "
1664	821	" " " " " "	Roy, Catherine	F.	15 16
" "	" "	" " " " " "	" "	"	" "

We hereby certify that the foregoing roll of Indian allottees of the White Earth Indian Reservation, Minn., showing their respective quantum of Indian blood, made in pursuance of authority contained in letter of March 19, 1910, from the Attorney General to the Secretary of the Interior, and in a letter of March 31, 1910, from the Secretary to the Attorney General, also under departmental authority of August 3, 1910, is accurate, authentic and complete as to the persons therein named, and that the information regarding the status as to blood was procured from the allottees themselves, their parents, or from older Indians having direct knowledge of the family history and degree of Indian blood possessed by each allottee.

We further certify that in all cases where information was obtained from the allottees and others through interpreters, the Indians thoroughly understood the purpose of the status roll, and that their answers were properly interpreted; also that each allottee was identified by the superintendent of the
 129 White Earth school and his assistants before the status of the Indian allottee was fixed.

December 31, 1910.

EUGENE H. LONG,
 Special Assistant to Attorney General.

J. H. HINTON,
 Special Indian Agent.

Acting under Supervision of the Department of Justice, Examined and approved.

MARSDEN C. BURCH,
Special Assistant to Attorney General,
In Charge of White Earth Matters.

Department of the Interior,

Office of Indian Affairs,

December 31, 1910.

The foregoing roll as to quantum of blood of Indian allottees belonging to the White Earth Reservation, Minn., prepared by Eugene H. Long, Special Assistant to the Attorney General, and John H. Hinton, Special United States Agent, acting under the supervision of the Department of Justice, in pursuance of authority contained in letter of March 19th, 1910, from the Attorney General to the Secretary of the Interior and in a letter of March 31, 1910, from the Secretary to the Attorney General; also under departmental authority of August 3, 1910, and by virtue of the act of June 21, 1906 (34 Stat. L. 325) is respectfully submitted to the Secretary of the Interior with the recommendation that it be approved.

R. G. VALENTINE,
Commissioner.

130

Department of the Interior,

Office of the Secretary.

The foregoing roll as to quantum of blood of Chippewa allottees belonging to the White Earth Reservation, Minn., is approved as recommended by the Commissioner of Indian Affairs.

R. A. BALLINGER,
Secretary.

131

Defendant's Exhibit 6-a.

White Earth, Minn., Feb. 8, 1908.

Simon Michelet, U. S. Indian Agent,

Dear Sir:—

Please get patent in fee simple for me, covering my additional allotment, as follows:

S $\frac{1}{2}$ SE $\frac{1}{4}$ Sec. 10, Twp. 142, R. 39.

Respectfully,

KAH-GO-JE-WE-GWON or
WILLIAM BIG BEAR.

132

Defendant's Exhibit 6-b

Affidavit as to the Status of Kah-go-je-we-gwon or William Big Bear.

State of Minnesota,
County of Becker—ss.

Frank Roy and Equay-me-do-gay or Susanna Roy of lawful age, each being first duly sworn, say:

That affiants are well acquainted with Kah-go-je-we-gwon or William Big Bear, who is the identical Indian of the Chippewa Tribe of Indians residing on the White Earth Indian Reservation to whom a trust or other patent containing restrictions upon alienation was issued for his original allotment No. 242,
and that he has selected for his additional allotment the following described land situate in the County of Becker, State of Minnesota, to-wit:

SE $\frac{1}{2}$ of SE $\frac{1}{4}$ of Sec. 10, T. 142, R. 39, carried on Additional Allotment Schedule as No. 166.

Affiants further say that they are well acquainted with the family history of the said Kah-go-je-we-gwon or William Big Bear and that he is about the age of twenty six years and is an adult Mixed-blood Indian whose allotment is within the White Earth Reservation, in the State of Minnesota.

Affiants further say that they are each residents of Becker County, State of Minnesota, and have been for over ten years last past, and are members of the Chippewa Tribe of Indians.

FRANK ROY His
 X
 Mark

EQUAY-ME-DO-GAY or SUSANNA ROY Her
 X
 Mark

Subscribed and sworn to before me this 22 day of April, 1908.

(Notarial Seal)

R. G. BEAULIEU,
Notary Public, Becker Co., Minn.

My commission expires December 15, 1908.

133

Defendant's Exhibit 6-c

Department of the Interior,

United States Indian Service,

Subject:

Application of
Kah-go-je-we-gwon or
William Big Bear for
fee simple patent.

White Earth Agency, Minn., April 23, 1908.

The Honorable,

The Commissioner of Indian Affairs,
Washington, D. C.

Sir:—

I have the honor to enclose herewith the application of Kah-go-je-we-gwon or William Big Bear for fee simple patent covering his additional allotment.

The applicant was allotted as an additional allotment the S $\frac{1}{2}$ SE $\frac{1}{4}$ of Sec. 10, T. 142, R. 39, covered by trust patent No. 166, enclosed herewith.

The applicant is an adult mixed-blood Indian of this Reservation and in support thereof I enclose herewith affidavit of Frank Roy and E-quay-me-do-gay or Susanna Roy, both members of the tribe.

Therefore I recommend that fee simple patent be issued covering his additional allotment.

Very respectfully,

SIMON MICHELET,
Supt. & Spec. Disb. Agt.

L
enclo.

134

Defendant's Exhibit 7-a

Detroit, Minn. June 30, 1910.

I hereby make application for patent in fee simple covering my additional allotment #1314, described as follows: the W $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 14, Township 142, N., Range 38 W., 5th Principal Meridian, Minn., containing 80 acres.

Witness to thumb mark

Harper
Thos. E. Hauser
J. H. Hinton

NE-BIN-AY-GE-SHIG

Her
X
Mark

135

Defendant's Exhibit 7-b

Affidavit as to the Status of Ne-bin-ay-ge-shig,

State of Minnesota,

County of Becker—ss.

W. D. Aspinwall and Charles Moulton of lawful age, each being first duly sworn, say:

That affiants are well acquainted with Ne-bin-ay-ge-shig who is the identical Indian of the Chippewa Tribe of Indians residing on the White Earth Indian Reservation to whom a trust or other patent containing restrictions upon alienation was issued for original allotment No.

..... and that she has selected for her additional allotment the following described land situate in the County of Becker, State of Minnesota, to-wit:

W $\frac{1}{2}$ of SW $\frac{1}{4}$ of Sec. 14, Township 142, Range 38, carried on Additional Allotment Schedule as No.

Affiants further say that they are well acquainted with the family history of the said Ne-bin-ay-ge-shig and that she is about the age of thirty three years and is an adult Mixed-blood Indian whose allotment is within the White Earth Reservation, in the State of Minnesota.

Affiants further say that they are each residents of Becker County, State of Minnesota, and have been for over ten years last past, and are members of the Chippewa Tribe of Indians.

CHARLES MOULTON

W. D. ASPINWALL

Subscribed and sworn to before me this 3rd day of July, 1908.
(Notarial Seal)

J. W. NUNN

Notary Public, Becker Co., Minn.

My commission expires Sept. 24, 1913.

136

Defendant's Exhibit 7-c.

Subject:

Application of Ne-bin-ay-ge-shig
for fee simple patent.

#1314.

White Earth, Minn. March 27, 1909.

The Honorable

Commissioner of Indian Affairs,
Washington, D. C.

Sir:—

I have the honor to transmit herewith the application of Ne-bin-ay-ge-shig for fee simple patent covering her allotment

described as the $W\frac{1}{2}$ of the $SW\frac{1}{4}$ of Sec. 14, T. 142, R. 38 covered by trust patent No. 1314 enclosed herewith, and with this application I submit affidavit signed by W. D. Aspinwall and Charles Moulton, both members of the tribe, showing that the applicant is an adult mixed-blood Indian.

In view of the facts set forth I respectfully recommend that a patent in fee simple be issued as applied for.

Very respectfully,

JOHN R. HOWARD,
Supt. & Spl. Disb. Agt.

JRH-MW

137

Defendant's Exhibit 7-d

Department of Justice
Office at
Detroit, Minnesota.

Aug. 20, 1910.

The Attorney General,
Washington, D. C.

Sir:—

On March 30, 1909, the Indian Office received an application for a patent in fee simple, under the provisions of the Act of June 21, 1906, (34 Stat. L., 325-353), for Additional Allotment No. 1314 signed Ne-bin-ay-ge-shig an allottee of the White Earth Indian Reservation, Minnesota, but the description was inaccurate. A second application was made June 30, 1910, to the Detroit Office embracing correct descriptions.

On Notice the allottee named appeared in person before us, for examination regarding her rightful status as to blood; that is, whether of mixed or full blood, and entitled to receive a patent in fee simple under said act.

The Allottee mentioned above was heard respecting her own views as to her correct status. After a careful investigation of the facts in the case we find the allottee Ne-bin-ay-ge-shig to be an adult mixed-blood, and grant the application for a patent in fee simple.

It is therefor respectfully recommended that the name of the applicant be submitted to the Secretary of the Interior for approval as an adult mixed-blood Indian of the White Earth reservation, and that he be requested to cause patent in fee simple to be issued in the name of the allottee Ne-bin-ay-ge-shig for the lands as applied for, and sent to us for delivery to the Indian applicant.

The application and the accompanying papers are enclosed with request that they be forwarded to the Secretary for his consideration in connection with the recommendations made.

Very respectfully,

E. H. LONG,
Spl. Asst. Atty. Gen'l.

J. H. HINTON,
Special Indian Agent.

138

Defendant's Exhibit 8-a

White Earth, Minn.
April 3rd, 1908.

I hereby make application for fee simple patent covering my original allotment described as follows:

..... Sec Twp Range

Also for my additional allotment described as follows:

SW $\frac{1}{4}$ of SE $\frac{1}{4}$ Sec 30, Twp 146, Range 42. #821

CATHERINE ROY.

139

Defendant's Exhibit 8-b

Affidavit as to the Status of Catherine Roy.

State of Minnesota,

County of Becker—ss.

Alex McDougall and John St. Luke of lawful age, each being first duly sworn, says:

That affiants are well acquainted with Catherine Roy.....
.....who is the identical Indian of the Chippewa
Tribe of Indians residing on the White Earth Indian Reserva-
tion to whom a trust or other patent containing restrictions up-
on alienation was issued for her original allotment No. 1664
.....
and that she has selected for her additional allotment the fol-
lowing described land situate in the County of Mahnoman,
State of Minnesota, to-wit:

Lot 12 & SW $\frac{1}{4}$ of SE $\frac{1}{4}$ or Sec. 30, T. 146, R. 42,
carried on Additional Allotment Schedule as No. 821.

Affiants further say that they are well acquainted with the family history of the said Catherine Roy and that she is about the age of Thirty-four years and is an adult Mixed-blood Indian

whose allotment is within the White Earth Reservation, in the State of Minnesota.

Affiants further say that they are each residents of Becker County, State of Minnesota, and have been for over ten years last past, and are members of the Chippewa Tribe of Indians.

ALEX McDOUGALL,
JOHN ST. LUKE.

Subscribed and sworn to before me this 4th day of April, 1908.

My commission expires

(Notarial Seal)

CHAS. C. SHIRTEVANT,
Notary Public, Becker Co., Minn.

140

Defendant's Exhibit 8-c.

Department of the Interior,
United States Indian Service.

White Earth, Minn, Aug. 7, 1908

Subject

Application for
fee simple patent,
Catherine Roy.

The Honorable

Commissioner of Indian Affairs,
Washington, D. C.

Sir:

I have the Honor to enclose herewith the application of Catherine Roy for fee simple patent covering her additional allotment.

The applicant was allotted as an additional allotment the Lot no. 12 and the SW $\frac{1}{4}$ of SE $\frac{1}{4}$ of Sec 30, T 146, R. 42, covered by trust patent No. 821, enclosed herewith.

The applicant is an adult mixed blood Indian of this Reservation and in support thereof I enclose herewith affidavit of Alex Mc Dougall and John St. Luke, both members of the tribe.

In view of above facts I recommend that fee simple patent be issued covering her additional allotment.

Very respectfully,

JOHN R. HOWARD.
U. S. Indian Agent.

MW
Enc.

141

Defendant's Exhibit 9-a

In the Matter of the Application of Kay-zhe-baush-kung
or Peter Big BearTo the Honorable Secretary of the Interior,
Washington, D. C.

The applicant herein, who desires to obtain a patent in fee simple for his allotment on the White Earth reservation in the State of Minnesota, respectfully represents to the Honorable Secretary of the Interior that he is 30 years of age; that he is a person of mixed white and Indian blood and a member of that band or tribe of the Chippewa Indians belonging on the said Reservation, that by reason thereof the following described land was allotted to him, on the said reservation, to-wit the north half of the southeast quarter of section nineteen in township one hundred forty-four of range thirty-eight west of the 5th P. M. in Minnesota and lot two of section five in township one hundred forty-one north of range forty west of the 5th P. M. in Minnesota, that a trust deed was issued to him by the United States for the said allotment, which said deed is hereto attached; that by the terms thereof the land therein described is conveyed to this applicant subject to the restrictions and conditions therein contained according to the Acts of Congress approved February 8th, 1887, and January 14th, 1889 in relation to the said Indians, that pursuant to said Acts of Congress that said land is held in trust by the United States, for the benefit of the allottee named in said deed, for a period of twenty-five years, that by an Act of Congress, approved June 21, 1906, all of said restrictions were removed as to adult mixed-bloods; that the trust deeds now or hereafter issued by the Department for such allotments were declared to pass the title in fee simple or upon application said mixed-bloods shall be entitled to receive a patent in fee simple for such allotments; that pursuant to such the said last mentioned Act of Congress, application is hereby made for a patent in fee simple for the land herein described; that this applicant is entitled to such patent in fee, for his said allotment, by reason of the fact that he belongs to that certain class of Indians on the said reservation, known and designated as mixed-bloods.

Dated this 27th day of May, 1908.

PETER BIG BEAR, Applicant.

State of Minnesota,
county of Mahnomen.Kay-zhe-baush-kung or Peter Big Bear, being duly sworn,
deposes and says, that he is the applicant named in the fore-

going application; that he is the identical Kay-zhe-baush-kung or Peter Big Bear who is named as grantee in the trust deed hereto attached; that the contents of the foregoing application have been read and fully explained to him before he subscribed his name thereto, that all statements therein made are true.

Subscribed and sworn to before me this 27th day of May, 1908.

(Seal)

LOUIS D. DAVIS

Notary Public, Mahnomen Co. Minn.

My commission expires Sept. 17, 1914.

142

Defendant's Exhibit 9-b

In the Matter of the Application of Kay-zhe-baush-kung or Peter Big Bear, for a patent in fee simple for allotment No. covering the N $\frac{1}{2}$ of the SE $\frac{1}{4}$ 19-144-38 & Lot 2 of Section 5—

State of Minnesota,

County of Mahnomen—ss.

Mah-en-gaunce of said County, being first duly sworn, in answer to the following questions, deposes in relation to the above matter as follows:

Q. What is your name? A. Mah-em-gaunce.

Q. How old are you? A. 73 years of age.

Q. Where do you live?

A. Twin Lakes, Mahnomen Co., Minn.

Q. How long have you lived there? A. 17 years.

Q. Do you know Kay-zhe-baush-kung or Peter Big Bear?

A. Yes sir; I do.

Q. How long have you known him?

A. Since he was a child.

Q. How old is he? A. He is thirty years of age.

Q. Where does he live? A. At White Earth, Minn.

Q. How long has he lived there? A. All his life.

Q. Are his father and mother living?

A. Yes sir; they are.

Q. How long have you known them, or if they are dead, when did they die, and how long did you know them during their life time? A. Since their childhood.

Q. Was either or both of them of mixed white and Chipewa Indian blood, and if only one of them, which one?

A. They are both mixed.

Q. Explain fully from what source the father and mother of said Kay-zhe-baush-kung or Peter Big Bear derived their white blood.

A. The father derived his white blood from his mother's side, and his mother derived her white blood from her father's side.

Q. How do you know that?

A. From my personal knowledge and acquaintance with them.

Q. Do you understand that you are swearing to this to enable Kay-zhe-baush-kung or Peter Big Bear to get a patent in fee for his allotment? A. I do.

his
MAH-EN-GAUNCE X
mark

Subscribed and sworn to before me this 25th day of July, 1908,
and I certify that I have no interest whatever in said
matter.

(Seal)

FREDERICK W. PEAKE
Notary Public, Becker Co., Minn.

My commission expires July 30, 1911.

Witness to mark:

F. W. Peake

E. E. Robitoille

State of Minnesota,

County of Becker—ss.

Mrs. Lizzie Schneider being first duly sworn says, I acted as Interpreter in taking the foregoing testimony of and I truthfully interpreted said questions to Mah-engauance and the foregoing answers thereto are the answers given by Mah-en-gaunce.

LIZZIE SCHNEIDER, Interpreter.

Subscribed and sworn to before me this 25th day of July, 1908.

(Seal)

FREDERICK W. PEAKE,
Notary Public, Becker Co. Minn.

Commission expires July 30th, 1913.

In the Matter of the Application of Kay-zhe-baush-kung
or Peter Big Bear, for a patent in fee simple for
allotment No. covering the N $\frac{1}{2}$ of the
SE $\frac{1}{4}$ 19-144-38 & Lot 2 of Section 5—

State of Minnesota,
County of Mahnomen—ss.

Ah-num-e-aunce of said County, being first duly sworn, in answer to the following questions, deposes in relation to the above matter as follows:

Q. What is your name? A. Ah-num-e-aunce.

Q. How old are you?

A. Seventy five years of age.

Q. Where do you live?

A. Twin Lakes, Mahnomen Co., Minn.

Q. How long have you lived there? A. 17 years.

Q. Do you know Kay-zhe-baush-kung or Peter Big Bear?

A. Yes sir; I do.

Q. How long have you known him?

A. Since he was a child.

Q. How old is he? A. He is thirty years of age.

Q. Where does he live? A. At White Earth, Minn.

Q. How long has he lived there? A. All his life.

Q. Are his father and mother living?

A. Yes sir; they are.

Q. How long have you known them, or if they are dead, when did they die, and how long did you know them during their life time? A. Since their childhood.

Q. Was either or both of them of mixed-white and Chip-pewa Indian blood, and if only one of them, which one?

A. They are both mixed.

Q. Explain fully from what source the father and mother of said Kay-zhe-baush-kung or Peter Big Bear derived their white blood.

A. The father derived his white blood from his mother's side, and his mother derived her white blood from her father's side.

Q. How do you know that?

A. From my personal knowledge and acquaintance with them.

Q. Do you understand that you are swearing to this to enable Kay-zhe-baush-kung or Peter Big Bear to get a patent in fee for his allotment? A. I do.

	Her
AH-NUM-E-AUNCE.	X
	Mark

Subscribed and sworn to before me this 25th day of July, 1908, and I certify that I have no interest whatever in said matter.

(Seal)

FREDERICK W. PEAKE,
Notary Public, Becker Co., Minn.

My commission expires July 30, 1911.

Witness to mark:

F. W. Peake

E. E. Robitoille

State of Minnesota,

County of Becker—ss.

Mrs. Lizzie Schneider being first duly sworn says, I acted as Interpreter in taking the foregoing testimony of and I truthfully interpreted said answers to and the foregoing answers thereto are the answers given by

LIZZIE SCHNEIDER, Interpreter

Subscribed and sworn to before me this 25th day of July, 1908.

(Seal)

FREDERICK W. PEAKE,
Notary Public, Becker Co. Minn.

Commission expires July 30th, 1913.

144

Defendant's Exhibit 9-d

Department of Justice
Office at
Detroit, Minnesota.

Aug. 12, 1910.

The Attorney General,
Washington, D. C.

Sir:—

On May 16 1910, the Detroit Office received an application for a patent in fee simple, under the provisions of the Act of June 21, 1906, (34 Stat. L., 325-353), for Additional Allotment No. 167 signed Peter Big Bear, an allottee of the White Earth Indian Reservation, Minnesota,

On Notice the allottee named appeared in person before me, for examination regarding his rightful status as to blood; that is, whether of mixed or full blood, and entitled to receive a patent in fee simple under said act.

The Allottee mentioned above was heard respecting his own views as to his correct status. After a careful investigation of the facts in the case we find the allottee Peter Big Bear or Kay-zhe-baush-kung to be an adult mixed-blood, and grant the application for a patent in fee simple.

It is therefore respectfully recommended that the name of the applicant be submitted to the Secretary of the Interior for approval as an adult mixed-blood Indian of the White Earth reservation, and that he be requested to cause a patent in fee simple to be issued in the name of the allottee Peter Big Bear or Kay-zhe-baush-kung, for the lands as applied for, and sent to us for delivery to the Indian applicant.

The application and the accompanying papers are enclosed with request that they be forwarded to the Secretary for his consideration in connection with the recommendations made.

Very respectfully,

E. H. LONG,
Spl. Asst. Atty. Gen'l.

J. H. HINTON,
Special Indian Agent.

145

Defendant's Exhibit 10-a

White Earth Agency, Minn.

June 9th, 1910.

I hereby make application for a fee simple patent for my Original allotment No. 4716 described as Lots two and three, Section eight, Twp. one hundred forty-two, R. thirty-seven, containing eighty-two and twenty-five hundredths.

WILLIAM DAILY.

146

Defendant's Exhibit 10-b

Affidavit as to the Status of Quay-koonce or William Daily.

State of Minnesota,

County of Becker—ss.

Ah-zhow-ah-cumig-ish-kung aged 72 yrs. & Wah-we-yay-cumig aged 56 yrs. each being first duly sworn, depose and say:

That affiants are, and for 26 years last past have been, well acquainted with Quay-koonce or William Daily who is the identical Indian of the Chippewa Tribe of Indians residing on the White Earth Reservation to whom a trust or other patent containing restrictions upon alienation was issued for his original allotment No. 4716 for Lots 2 & 3 Sec 8-142-37 -82.25 A.

Affiants further say that they are well acquainted with the family history of the said Quay-koonce or William Daily and

Affiants further say that they are each residents of Mahnomen County, State of Minnesota, and have been for over six years last past, and are members of the Chippewa Tribe of Indians.

WAH-WE-YAY-CUMIG

(L. R. Barto)

(scale)

My commission expires April 25, 1915.

Sept. 8th, 1910.

On July, 30th, 1910, the Detroit Office received an application for a patent in fee simple, under the provisions of the Act of June 21, 1906 (34 Stat. L., 325-353), for Original Allotment No. 4716 signed by William Daily an allottee of the White Earth Indian Reservation, Minnesota.

On Notice the allottee named appeared in person before us, for examination regarding his rightful status as to blood; that is, whether of mixed or full blood, and entitled to receive a patent in fee simple under said act.

The Allottee mentioned above was heard respecting his own views as to his correct status. After a careful investigation of the facts in the case we find the allottee named above to be an adult mixed-blood, and grant the application for a patent in fee simple.

It is therefore respectfully recommended that the name of the applicant be submitted to the Secretary of the Interior for approval as an adult mixed-blood Indian of the White Earth reservation, and that he be requested to cause a patent in fee simple to be issued in the name of the allottee, William Daily or Quay koonce, for the lands as applied for, and sent to us for delivery to the Indian applicant.

The application and the accompanying papers are enclosed with request that they be forwarded to the Secretary for his consideration in connection with the recommendations made.

Very respectfully,

E. H. LONG,
Spl. Asst. Atty. Gen'l.

J. H. HINTON,
Special Indian Agent.

148

Defendant's Exhibit 11-a

Ponsford, Minn., Feb. 6, 1908.

Simon Michelet

U. S. Indian Agent

Dear Sir:

Please get Patent in fee simple for me covering my additional allotment as follows:

W $\frac{1}{2}$ of SE $\frac{1}{4}$ Section 22, Twp. 142 Range 38.

Respectfully

MOSH-KIN-AY-YAUSH

(His)

or SAM FINEDAY X

(Mark)

Witnesses

Fred J. Beaulieu

R. G. Beaulieu

149

Defendant's Exhibit 11-b

Affidavit as to the Status of Mosh-kin-ay-aush or Sam Fineday

State of Minnesota,

County of Becker—ss.

Kah-u-gane-in-de-bay and O-jib-way of lawful age, each being first duly sworn, say:

That affiants are well acquainted with Mosh-kin-ay-aush or Sam FineDay who is the identical Indian of the Chippewa Tribe of Indians residing on the White Earth Indian Reservation to whom a trust or other patent containing restrictions upon alienation was issue for original allotment No.

..... and that he has selected for his additional allotment the following described land situate in the County of Becker, State of Minnesota, to-wit:

W. $\frac{1}{2}$ of S. E. $\frac{1}{4}$ Section 22 Township 142 Range 38.
carried on Additional Allotment Schedule as No.

Affiants further say that they are well acquainted with the family history of the said Mosh-kin-ay-aush or Sam Fine Day and that is about the age of Fifty eight years and is an adult Mixed-blood Indian whose allotment is within the White Earth Reservation, in the State of Minnesota.

Affiants further say that they are each residents of Becker County, State of Minnesota, and have been for over Thirty years last past, and are members of the Chippewa Tribe of Indians.

KAH-U-GONE-IN-DE-BOY

or JOE BOARD

His
X
Mark

O-JIB-WAY

His
X
Mark

Subscribed and sworn to before me this 7th day of April, 1908.

(Notarial Seal)

B. S. FAIRBANKS,
Notary Public, Becker Co., Minn.

My commission expires

150

Defendant's Exhibit 11-c

Department of the Interior,

United States Indian Service.

Subject:

Application for
Moshk'n ay yaush
for fee simple pat-
additional allotment.

White Earth Agency, Minn,
April 15, 1908.

The Honorable,
The Commissioner of Indian Affairs,
Washington, D. C.

Sir:

I have the honor to enclose herewith the application of Mosh-kin-ay-yaush for fee simple patent covering his additional allotment.

The applicant was allotted as an additional allotment the $W\frac{1}{2}$ of $SE\frac{1}{4}$ of Sec. 22, T. 142, R. 38, covered by trust patent No. 1632, enclosed herewith.

The applicant is an adult mixed-blood Indian of this Reservation and in support thereof I enclose herewith affidavit of Kah-u-gane-in-de-bay or Joe Board and O-jib-way, both members of the tribe. I hereby certify that Mosh-kin-ay-yaush—or Sam Fineday making application, and Mosh-kin-ay-yaush carried on the allotment schedule is one and the same person.

Therefore I recommend that fee simple patent be issued covering his additional allotment.

Very respectfully,

SIMON MICHELET
Supt. & Spec. Disb. Agent.

151

Government's Exhibit "C"

(Stipulation as to Testimony of Mah-een-gaunce, et al.)

It is hereby stipulated and agreed by and between the respective parties to the above entitled cause, by their solicitors and counsel, that one Mah-een-gaunce if placed upon the witness stand in said cause, on behalf of the complainant, would testify as follows, viz:—

"I am a chief of the Mille Lac Band of Mississippi Chippewas residing on the White Earth Reservation, State of Minnesota. I am seventy (70) years of age, and until the mixed bloods were allowed to sell their lands did not understand what the white people would call a mixed-blood. With the Indians, when a white man married an Indian woman, their children were called half-breeds or mixed-bloods; if those children married a white man or woman their children were still mixed-bloods; but if they were to marry an Indian, the children of this marriage would be Ah-nay-she-naby, (Indians, or of our people): for instance, En-nah-zahn, is a mixed-blood and married an Indian woman, we consider their children to be Ah-nay-she-naby (or Indians), and that is the way the Indians voted one another before they were allowed to sell their allotments."

And that one Mah-je-ge-shig would testify as follows; viz:—

I reside on the White Earth Reservation, State of Minnesota. I am a Chippewa Indian nearly seventy-five (75) years of age and became chief of my band at the death of my father, Do-cogod, who was chief before me. I signed a paper asking for the treaty of March 19, 1867, creating the White Earth Reservation, but did not go to Washington with the delegation of chiefs. In that treaty it says that no annuities will be paid to any half-breed or mixed-blood except those living on the Reservation. That meant those mixed-bloods that came from

152 Wisconsin, and were not allowed to live on the Indian's side of the river. Gah-gog, Baush-kin-aince, Kah-do-kin, Che-be-nay, and Ah-ke-wen-zie-be-nah-zha, were brothers and half-breeds, their father being a Frenchman, but they married Indian women and their children were Indians; Joe Critt's father was a Frenchman, that made him (Joe Critt) a half-breed or mixed-blood, but his children by his Indian wife were Indians. E-quay-we-do-gay is an Indian; she married a half-breed or mixed-blood but we considered her children as Indians. If a half-breed or mixed-blood as we call them, married another mixed-blood, or a white man or woman, their children would be mixed-bloods. That is all the kind of half-breeds or mixed-bloods that I ever heard of until the Indians were allowed to sell their land, then the land buyers tried to make all of us mixed-bloods. We have two words to express our way of thinking about the blood of our people: One means an Indian, the other means one not an Indian; and before they began to buy our land, they were used as I have told you. I do not know who first changed the meaning of the words."

And that one May-zhuc-e-ge-shig would testify as follows, viz:—

I reside on the White Earth Reservation, State of Minnesota. I am the hereditary head chief of the Mississippi Band of Chippewa Indians. I am over eighty (80) years of age, and the last living of the ten chiefs that went to Washington and signed the treaty creating the White Earth Reservation; in said treaty we said that no half-breed or mixed-breed except those living on the reservations, should receive any benefit from the annuities on the new reservation. We had a few mixed-bloods with us, but more that lived off the reservation. What we mean by a half-breed or mixed-blood is this: My wife is married to a white man, her children are mixed-bloods; if they marry a white man, their children will be mixed-bloods; if they marry an Indian, their children will be mixed-bloods. We do not think as the people do that have bought Indians. W.

our land; they have said that if the Indians had a cousin that was a mixed-blood, that made the Indian a mixed-blood. We have two words to tell what we want to say; one is what we use when we mean an Indian, and the other when we mean they are mixed-bloods."

153 It is further agreed that such statements may be treated by the Court the same as though made under oath upon the witness stand. Subject, however, to objections made by defendants' counsel; that the same are immaterial, irrelevant, and incompetent; but no objection is made to the manner of introducing this testimony into the record.

CHAS. C. HOUP,
 Solicitor for Complainant.

M. C. BURCH,
 Counsel for Complainant.

R. J. POWELL,
 Solicitor for Defendants.

154

Duluth, Minnesota, September 2, 1912.

Appearances: Same as in previous hearings.

(Offers of Certain Exhibits on Behalf of the Government.)

Mr. Cain: I offer in evidence Government's Exhibits D, D-1 and D-2; Exhibit D, being a letter from the Department to the Indian allottee, Ay-nah-be-quay, denying the application for a fee simple patent;

D-1, being a letter from the Acting Attorney General to the Secretary of the Interior, dated August 16, 1910, transmitting copy of letter from E. H. Long, Special Assistant to the Attorney General, recommending that a fee simple patent be denied.

D-2, is a letter from E. H. Long and J. H. Hinton, to the Attorney General, dated July 22, 1910, stating that the allottee is of doubtful blood and denying the application for a fee simple patent.

I also offer in evidence Government's Exhibits E, being a letter from the Department to the Indian allottee Pah-dog-a-ge-shig, or Blair, dated September 10, 1910, denying application for a fee simple patent.

E-1 is a letter from the Acting Attorney General to the Secretary of the Interior, dated August 15th, 1910, transmitting letter of E. H. Long, recommending that application be denied.

Site Earth

E-2 is a letter from E. H. Long and J. H. Hinton to the Attorney General, dated August 5, 1910, stating the Indian allottee to be of doubtful blood, and denying the application for a fee simple patent.

I also offer in evidence Government's Exhibits F; Exhibit F is a letter from the Department to Mary Roy, alias Kah-taw-ke-wah-be-quay, dated September 9, 1910, denying application for a fee simple patent.

F-1 is a letter from E. H. Long and J. H. Hinton to the Attorney General, dated August 12, 1910, stating that the allottee is of doubtful blood, and denying the application for a fee simple patent.

I also offer in evidence Government's Exhibits G; Exhibit G, is a letter from the Department to the Indian Equay-way-aun, dated October 3, 1910, denying the application for a fee simple patent.

G-1, is a letter from E. H. Long and H. H. Hinton to the Attorney General, dated September 10, 1910, stating the allottee to be of doubtful blood, and denying the application.

I also offer in evidence Government's Exhibits H; Exhibit H, being a letter from the Department to Bay-baun-e-ge-shig-o-quay, dated October 3, 1910, denying the application for a fee simple patent.

H-1, is a letter from E. H. Long and J. H. Hinton to the Attorney General, dated September 10, 1910, stating that the allottee is of doubtful blood, and denying the application for a fee simple patent.

(At this time the hearing was adjourned to September 3, 1912, at which time the case is to be argued to the Court).

156

(Certificate of Special Examiner.)

I, J. J. Cameron, Special Examiner, appointed by the Court to take and report to the Court the proceedings and evidence offered in the above entitled action, do hereby certify that under and by virtue of such order I did take in shorthand all the proceedings had before me, and I do hereby report same to the Court.

Dated September 3rd, 1912.

J. J. CAMERON,
Special Examiner.

SUCH HAS BEEN
1912

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FIRST NAT. BANK OF DETROIT, MINN. VS.

157

Government's Ex.

-D-

Sales
Land-

67410-1910

H A D

Patent in fee
Ay-nah-be-quay.

Ay-nah-be-quay,

(Through Superintendent White Earth Indian School).

White Earth, Minnesota.

My friend:

On July 22, 1910, Mr. E. H. Long, Special Assistant to the Attorney General, and Mr. J. H. Hinton, Special Indian Agent, filed a report on your application for a patent in fee simple covering your original allotment No. 3459.

As it does not appear from the reports in the case that you are a mixed-blood, your application is hereby denied. Your trust patent will be retained by the Department of Justice until investigations now in progress are completed, when it will be returned to you.

Very respectfully,

(Signed) C. E. HAUKE,
Second Assistant Commissioner.

8-F.J.M.-29
12291.

158

Government's Exhibit

D-1

EK
152715
AHS

EK
AHS-JMA

Department of Justice,
Washington, D. C.

August 16, 1910.

The Secretary of the Interior,

Sir:

Inclose is a copy of a letter dated July 22, 1910, from E. H. Long, Esq., Special Assistant to the Attorney General, in which he recommends that a patent in fee simple be not issued upon the application made May 16, 1910, by Ay-nah-be-quay, for original allotment No. 3459, in the White Earth

Indian Reservation, Minnesota, for the reason among others, that the applicant is of doubtful blood, and therefore not entitled to such patent.

You will observe that Mr. J. H. Hinton, of the United States Indian Service concurs in the above recommendation.

Very respectfully,

(signed) W. R. HARR.
Acting Attorney General.

Inc. 36371.

Department Stamps.

Dept. of the Interior,
Received

Aug. 17, 1910

to Indian Office

Secy's Off.—Mails & Files.

Office of Indian Affairs
Received

Aug. 18 1910

67410

159

Government's Ex.

D-2

Orig. Allot. 3459.

Ay-nah-be-quay

Department of Justice

Office at

Detroit, Minnesota.

July 22, 1910.

The Attorney General,

Washington, D. C.

Sir:

On May 16, 1910 the Detroit Office received an application for a patent in fee simple under the provisions of the Act of June 21, 1906 (34 Stat. L. 325-353), for Original allotment No. 3459, signed Ay-nah-be-quay, "her mark", without witnesses, an allottee of the White Earth Indian reservation, Minnesota.

On notice the allottee named appeared in person before us for examination regarding her rightful status as to blood; that is, whether or mixed or full blood, and entitled to receive a patent in fee simple under said act.

The allottee mentioned above was heard respecting her own views as to her correct status. After a careful investigation of the facts in the case, we find Ah-nah-be-quay to be of doubtful blood, and deny the application for a patent in fee simple.

It is respectfully requested that the Secretary of the Interior be advised of the facts as herein set forth.

The application and accompanying papers are retained by us for such further action, if any, as the facts and the law war-

rant. This is a case for further investigation and decision by the court in all probability.

Very respectfully,

E. H. LONG,
Spl. Asst. Atty. Gen'l.

J. H. HINTON,
Special Indian Agent.

160

Government's Exhibit
"E"

Land-
Sales

67102-1910.

H A D

Patent in fee

Sept. 10 1910

Pah-dub-e-ge-shig,
or Blair.

Pah-dub-e-ge-shig, or Blair,

Through Superintendent, White Earth Indian School,
White Earth, Minn.

My Friend:

On August 15, 1910, Mr. E. H. Long, Special Assistant to the Attorney General, and Mr. J. H. Hinton, Special Indian Agent, filed a report on your application for a patent in fee simple covering your original allotment No. 4926.

It is not clearly shown that you are a mixed-blood. The application is denied. The application and accompanying papers will be retained by the Department of Justice until investigations now in progress are completed, when it will be returned to you.

Very respectfully,

(Signed) C. E. HAUKE,
Second Assistant Commissioner.

9-LLN-7

161

Government's Ex.
E-1.E. K.152949-1Department of Justice,
Washington, D. C.

August 15, 1910.

The Secretary of the Interior,
Sir:

Inclosed is a copy of a letter dated August 5, 1910, from E. H. Long, Esq., Special Assistant to the Attorney General, in which he recommends that a patent in fee simple be not issued upon the application made May 16, 1910, by Pah-dub-ge-shig, or Blair, for original allotment No. 4926, in the White Earth Indian Reservation, Minnesota, for the reason, among others, that the applicant is of doubtful blood, and therefore not entitled to such patent.

You will observe that Mr. J. H. Hinton, of the United States Indian Service, concurs in the above recommendation.

Very respectfully,

(signed)

Acting Attorney General.

Inc. 36370.

Department of the Interior.

Received

Aug. 16 1910

to Indian Office

Secy's Off.—Mails & Files.

Department of the Interior

Received

Aug. 17 1910

to Indian Office

Secy's Off.—Mails & Files.

Department Stamps.

Office of Indian Affairs

Received

Aug. 17 1910

67102

Government's Ex.

E-2

Office of Indian Affairs

Received

Aug 17 1910

(Department Stamp.)

Department of Justice

Office at

Detroit, Minnesota.

Aug. 6, 1910.

The Attorney General,

Washington, D. C.

Sir:

On May 16, 1910, the Detroit Office received an application for a patent in fee simple under the provisions of the Act of June 21, 1906 (34 Stat. L. 325-353), for Original allotment No. 4926, signed Pal-dub-ee-geshig, or Blair "his X mark", an allottee of the White Earth Indian reservation, Minnesota.

On notice the allottee named appeared in person before us for examination regarding his rightful status as to blood; that is, whether of mixed or full blood, and entitled to receive a patent in fee simple under said act.

The allottee mentioned above was heard respecting his own views as to his correct status. After a careful investigation of the facts in the case, we find the allottee named above to be of doubtful blood, and deny the application for a patent in fee simple. The Indian is blind and ceds the protection of the Government.

It is respectfully requested that the Secretary of the Interior be advised of the facts as herein set forth.

The application and accompanying papers are retained by us for such further action, if any, as the facts and the law warrant.

Very respectfully,

(signed) E. H. LONG

Spl. Asst. Atty. Gen'l.

(signed) J. H. HINTON

Special Indian Agent.

163

Government's Ex.
F.

Land-

Sales

66627-1910.

H A D

Sep.-9 1910

Patent in fee,

Mary Roy, alias

Kah-taw-ke-wah-be-quay.

Mary Roy (alias Kah-taw-ke-wah-be-quay).

Through Superintendent White Earth Indian School,
White Earth, Minnesota.

My Friend:

On August 12, 1910, Mr. E. H. Long, Special Assistant to the Attorney General and Mr. J. H. Hinton, Special Indian Agent, filed a report on your application for a patent in fee simple covering your additional allotment No. 1200.

It is not clearly shown that you are a mixed-blood. The application is, therefore, denied. Your trust patent will be retained by the Department of Justice until investigations now in progress are completed, when it will be returned to you.

Very respectfully,

(Signed) C. F. HAUKE,
Second Assistant Commissioner.

9-LLN-7.

164

Government's Ex. F-1.

Department of Justice

Office at

Detroit, Minnesota.

Aug. 12, 1910.

The Attorney-General,

Washington, D. C.

Sir:

On May 16, 1910, the Detroit Office received an application for a patent in fee simple under the provisions of the Act of June 21, 1906 (34 Stat. L. 325-353) for Additional Allotment No. 1200, signed Mary Roy an allottee of the White Earth Indian reservation, Minnesota.

On notice the allottee named appeared in person before us for examination regarding her rightful status as to blood; that is, whether of mixed or full blood, and entitled to receive a patent in fee simple under said act.

The allottee mentioned above was heard respecting her own views as to her correct status. After a careful investigation of the facts in the case, we find Mary Roy (alias Kah-taw-ke-wah-be-quay) to be of doubtful blood, and deny the application for a patent in fee simple.

It is respectfully requested that the Secretary of the Interior be advised of the facts as herein set forth.

The application and accompanying papers are retained by us for such further action, if any, as the facts and the law warrant.

Very respectfully,

(Signed) E. H. LONG,
Spl. Asst. Atty. Gen'l.
(signed) J. H. HINTON
Special Indian Agent.

165

Government's Ex. G.

Land-

Sales

74962-1910

E S S

Application for
patent in fee.

Oct. -3 1910

Equay way-aun

(Through Superintendent White Earth Indian School.)

White Earth, Minnesota.

Madam:

On September 10, 1910, Mr. T. H. Long, Special Assistant Attorney General, and Mr. J. H. Hinton, Special Indian Agent, forwarded your application for a patent in fee simple covering your original allotment No. 4720.

Investigation fails to show that you are an adult mixed blood, and your competency to care for your own affairs is not shown. Your application is therefore denied. The trust patent which accompanied it will be retained by the Department of Justice for such further action if any as the facts and the law

warrant. When the investigations now in progress are completed, it will be returned to you.

Very respectfully,

(Signed) F. H. ABBOTT,
Assistant Commissioner

9-GC-26.

165a

Government's Ex. G-1.

Department of Justice
Office at
Detroit, Minnesota.

Sept. 10, 1910.

The Attorney General,
Washington, D. C.

Sir:

On May 6th, 1910, the Detroit Office received an application for a patent in fee simple under the provisions of the Act of June 21, 1906 (34 Stat. L. 325-353), for Original Allotment No. 4720, signed Equay way-aun, an allottee of the White Earth Indian reservation, Minnesota.

On notice the allottee named appeared in person before us for examination regarding her rightful status as to blood; that is, whether of mixed—or full blood, and entitled to receive a patent in fee simple under said act.

The allottee mentioned above was heard respecting her own views as to her correct status. After a careful investigation of the facts in the case we find the applicant named to be of doubtful blood, and deny the application for a patent in fee simple.

It is respectfully requested that the Secretary of the Interior be advised of the facts as herein set forth.

The application and accompanying papers are retained by us for such further action, if any, as the facts and the law warrant.

Very respectfully,

(signed) E. H. LONG,
Spl. Asst. Atty Gen'l.

Department Stamp.
Office of Indian Affairs

Received
Sept. 16 1910
74962

J. H. HINTON,
Special Indian Agent.

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FIRST NAT. BANK OF DETROIT, MINN. VS.

166

Government's Ex. H.

Land-
Sales

74966-1910

E S S

Application for
patent in fee.

Oct. -3 1910

Bay-baum-e-ge-shig-o-quay

(Through Superintendent White Earth Indian School.)

White Earth, Minnesota

Madam:

On September 10, 1910, Mr. T. H. Long, Special Assistant Attorney General, and Mr. J. H. Hinton, Special Indian Agent, forwarded your application for a patent in fee simple covering your original allotment No. 4721.

Investigation fails to show that you are an adult mixed blood. Your application is denied. The trust patent which accompanied it will be retained by the Department of Justice for such further action if any as the facts and the law warrant. When the investigations now in progress are completed, it will be returned to you.

Very respectfully,

(Signed) F. H. ABBOTT,

Assistant Commissioner.

9-GC-26.

167

Government's Ex.

H-1.

Department of Justice
Office at
Detroit, Minnesota.

Sept. 10, 1910.

The Attorney General,
Washington, D. C.

Sir:

On May 6th, 1910, the Detroit Office received an application for a patent in fee simple under the provisions of the Act of June 21, 1906 (34 Stat. L. 325-353), for original Allotment No. 4721, signed Bay-baum-e-ge-shig-o-quay, an allottee of the White Earth Indian reservation, Minnesota.

On notice the allottee named appeared in person before us for examination regarding her rightful status as to blood; that is, whether of mixed-or full blood, and entitled to receive a patent in fee simple under said act.

The allottee mentioned above was heard respecting her own views as to her correct status. After a careful investigation of the facts in the case, we find the applicant named above to be of doubtful blood, and deny the application for a patent in fee simple.

It is respectfully requested that the Secretary of the Interior be advised of the facts as herein set forth.

The application and accompanying papers are retained by us for such further action, if any, as the facts and the law warrant.

Very respectfully,

(signed) E. H. LONG,
Spl. Asst. Atty. Gen'l.

(signed) J. H. HINTON,
Special Indian Agent.

168

(Decree.)

The United States of America, Plaintiff,
vs.

The First National Bank of Detroit, Minnesota, Defendant.

At the January Term of the United States District Court, District of Minnesota, Fifth Division, Held at the United States Court Room in the City of Duluth on the Twenty-Sixth Day of June, in the Year of our Lord, One Thousand Nine Thousand and Twelve.

Present: Hon. PAGE MORRIS,
District Judge.

This Cause came on to be further heard at the July term of said Court on the 3rd day of September, A. D. 1912, and was argued by Counsel and continued for advisement until the 14th day of September, 1912; and thereupon, upon consideration thereof it is ordered, adjudged and decreed, as follows: That a mortgage dated July 17, 1908 executed by O-Bah-Baum (or Rose Ellis) and George Ellis, her husband, to the defendant herein, the First National Bank of Detroit, Minnesota, under date of July 17, 1908 upon the West half of the Southwest quarter of Section Five, Township one-forty-one, North of Range thirty-nine West of the Fifth Principal Meridian, (the

same being the land and the mortgage thereon, as described in the complaint herein) for the sum of sixty dollars (\$60.00), and filed July 17th, 1908 in the Office of the Register of Deeds for Becker County, and thereafter recorded in Mortgage Book 30, page 256, is null and void and without force and effect, the said O-Bah-Baum (or Rose Ellis) having no right or authority whatsoever to so mortgage said premises, she being then and there a full blood Indian of the Chippewas of the Mississippi on the White Earth Reservation, State of Minnesota, holding said described lands only in trust for the Government of the United States of America under certain treaties and laws pertaining thereto. It is further ordered, adjudged and decreed that the defendant herein, the First National Bank of Detroit, Minnesota duly discharge said mortgage from the records forthwith, and that in case it fails so to do, this decree may be recorded and have the same force and effect as such a discharge would have.

Dated September 27, 1912.

PAGE MORRIS,
Judge.

170

(Order of Submission, June 26, 1912.)

Before Judge Morris.

This day come all the parties to said cause by their respective solicitors and counsel, Hon. C. C. Houpt, United States Attorney, as solicitor, and Messrs. W. A. Norton and Gordon Cain, as Counsel, appearing on behalf of the complainant, and R. J. Powell, Esq., appearing on behalf of the defendant; whereupon, the evidence is duly submitted and said cause comes on for final hearing in equity upon the pleadings, proofs, exhibits and all the records. W. S. Norton, Esq., opens, states and argues the case on behalf of the complainant, and R. J. Powell, Esq., opens, states and argues the same on behalf of the defendants. And the Court having heard the statements and arguments by counsel for the respective parties, and being fully informed in the premises, takes the matter under advisement.

171

(Opinion on First Hearing, June 28, 1912.)

Before Judge Morris.

United States of America, Complainant,
vs. In Equity.
First National Bank of Detroit, Defendant.

Sixth Div. No. 356.

Fifth Div. No. 266.

United States of America, Complainant,
vs. In Equity.

Nicols-Chisholm Lumber Company, et al., Defendants.

Sixth Div. No. 559.

Fifth Div. No. 267.

United States of America, Complainant,
vs. In Equity.

Minneapolis Trust Company, et al., Defendants.

Sixth Div. No. 1184.

Fifth Div. No. 268.

This day come again all the parties to the above entitled causes, by their respective solicitors and counsel, Messrs. W. A. Norton and Gordon Cain appearing on behalf of the complainants, and R. J. Powell, Esq., appearing on behalf of the defendants; whereupon, the court announced its decision, as follows:

While no other point raised by the records in these cases has been waived, the principal, and indeed the only, argument upon this hearing has been as to the meaning of the words "mixed-blood Indians" in the so-called Clapp Amendment to the acts of June 2, 1906, chap. 3504 U. S. Stat. at Large, vol. 34, part 1, page 353, and the act of March 1, 1907, chap. 2285 U. S. Stat. at Large, vol. 34, part 1, page 1034. This amendment in the act of June 21, 1906, reads as follows:

"That all restrictions as to sale, incumbrance, or taxation for allotments within the White Earth Reservation in the State of Minnesota, now or hereafter held by adult mixed-blood Indians, are hereby removed, and the trust deeds heretofore or hereafter executed by the Department for such allotments are hereby declared to pass the title in fee simple, or such mixed-bloods upon application shall be entitled to receive a patent in fee simple for such allotments; and as to full bloods, said restrictions shall be removed when the Secretary of the Interior is satisfied that said adult full-blood Indians are competent to handle their own affairs, and in such case the Secretary of the Interior shall issue to such Indian allottee a patent in fee simple upon application".

The only change made by the act of March 1, 1907, in this amendment was by substituting the word "heretofore" in place of the word "now" after the words "State of Minnesota". In Case No. 356 the stipulation of fact as to the blood status of the allottee is as follows: "That said allottee, it is agreed,

had and has some White blood, derived from a remote White ancestor, the exact amount whereof is and was undetermined, but in that behalf it is agreed that it did not exceed one-thirty-second." In Case No. 559 the stipulation of fact in that respect is as follows: "That said allottee, it is agreed, had and has one-sixteenth of White blood, no more and no less". The stipulation of fact in that respect in Case [N.] 1184 is as follows: "That said allottee, it is agreed, had and has one-eighth of White blood, no more and no less".

The question here raised is one of first impression, and therefore no light is thrown upon it and no assistance afforded the court by judicial decisions, except possibly by the decisions in the cases of *Farrell vs. U. S.*, 110 Fed., 942p *Brown, Admx., vs. U. S.*, 113 U. S., 568; and *U. S. vs. Philbrick*, 120 U. S., 52, wherein it is held, in the first case above referred to that, "In ascertaining the tribal and other relations of Indians, courts generally follow the executive and legislative departments to which the determination of these relations has been especially entrusted"; and in the second case, that "In case of ambiguity in a statute, contemporaneous and uniform executive construction is regarded as decisive"; and in the third case, that "The contemporaneous construction of a statute by the executive department charged with its execution is entitled to great weight, and ought not to
173 be overturned unless clearly erroneous". But these decisions furnish little light, inasmuch as they had reference to matters so entirely different from that dealt with in the so-called Clapp Amendment. It appears from the stipulation of facts that in construing the seventh subdivision of the second article of the treaty of September 30th, 1854, the Commissioner of Indian Affairs construed the term "mixed-bloods", used in that subdivision of said treaty "to mean all who are identified as having a mixture of Indian and White blood". And he goes on to say that "the particular proportion of each blood is, therefore, immaterial, where the provision is so broad as that stated in the treaty". But even that construction so made by the [Commissioner] of Indian Affairs affords little light because of the wide difference between the matters dealt with in said treaty and the matter dealt with in the law now under consideration. The stipulation of facts further shows that "In the administration of the Bureau of Indian Affairs relating to the Chippewa Indians on the White Earth Reservation under the act of June 21, 1906, and the act of March 1, 1907, commonly known and referred to as the Clapp Act, and particularly with reference to the issuance of fee patents to Chippewa Indians on the White Earth Reservation, applying therefor, on the ground that they (the said Indians) are 'mixed-bloods', the Department has not required

any statement to be submitted showing the quantum of foreign blood, but has issued such fee patents upon the showing that the applicant was a mixed-blood." But this also furnishes little assistance, inasmuch as it does not appear that the exact question here submitted has been definitely and specifically raised and passed upon by the Department. Nor do I find any assistance in reading the parts of treaties, in which somewhat similar terms are used.

It is apparent from a reading of this Clapp Amendment that congress had in view in its passage the emancipation of allottees within the White Earth Indian Reservation from all restrictions under certain conditions. And it would seem from a careful reading thereof that congress intended that its words should be interpreted, at least to some extent, by the test of whether or not any allottee was competent
174 to handle his own affairs. It seemed to have meant to say that it is to be conclusively presumed that an adult mixed-blood is so competent, and that as to an adult full-blood, while he may also be so competent, yet it must be left to the Secretary of the Interior to investigate and say whether or not that is the fact. But did congress mean to say, in using the term "mixed-blood Indians" in that connection, that no matter how attenuated the mixture of White blood might be, such conclusive presumption should prevail? In the case of *Sloan vs. U. S.*, 118 Fed., 283, the court holds that in construing treaties or conventions made by the Indians the terms "half-blood" and "mixed-blood" are to be given their ordinarily understood meaning. I do not know of any ordinarily understood meaning of the term "mixed-blood". I have been much impressed by the argument, from an ethical standpoint, of the learned counsel for the complainant in these cases, and I think we must presume that congress intended to do what was right in this matter, having in full view its heretofore assumed relation as guardian for these allottees. At the same time the great difficulty here encountered is as to where to draw the line in reference to the quantum of White or foreign blood in a fair and proper construction of this act. I can not bring myself to believe that congress meant to say that any admixture of White blood, however slight, would furnish a conclusive presumption of the competency of the allottee to manage his own affairs; on the contrary, after careful reflection, I can not help coming to the conclusion that it meant by the term "mixed-blood Indian" any Indian having a reasonable [quantum] of White, or foreign, blood; in other words that the said so-called Clapp Amendment should receive a reasonable construction. The difficulty is in ascertaining, without entering upon the domain of judicial legislation, to which I am entirely opposed, where

such reasonable quantum begins and ends. I am satisfied that a fair mind would revolt at the suggestion that an allottee who has some White blood, derived from a remote White ancestor, the exact amount whereof is undetermined, but does not exceed one-thirty-second part, would possess such reasonable
175 quantum, especially when we keep in mind the apparent object of this statute and the relation of guardianship heretofore existing. I am satisfied that a fair mind would say that certainly an allottee having an admixture of one-half White blood would come within the fair and reasonable meaning of the term, and that the same might be said as to one having an admixture of one-fourth White blood, or possibly as to one having a mixture of one-eighth White blood. But when we get beyond that it is difficult for me to understand how any smaller mixture of White blood would in and of itself in any degree affect the capacity of the allottee to manage his own affairs. While I am anxious to avoid what might in the slightest degree be interpreted as judicial legislation, my mind [leands] me to the conclusion that a fair and reasonable construction of this act requires that the line should be drawn at the point above indicated.

I am not unmindful of the fact that this holding may affect the property rights of parties who have acted in good faith in the belief that they were following the law, but I feel that I must give to this act a reasonable construction.

The decrees will therefore be drawn as follows:

In cases 356 and 559 in favor of the complainant, and in case 1184 that the bill be dismissed.

Thereupon Mr. Powell moves the court to reopen cases Nos. 356 and 559, so as to enable him to take further proofs therein, to which motion Mr. Norton objected, and stated that if the court granted such motion, it should also order that case No. 1184 be reopened, and treated with the other cases.

The court thereupon granted the motion of Mr. Powell, and ordered that all the cases be reopened for the purpose of taking further proofs therein, and that they be re-referred to Mr. J. J. Cameron, special examiner therein, before whom such proofs shall be taken. It is further

Ordered that such proofs shall be taken and the cases ready for rehearing not later than September 1st, 1912. Upon motion of Mr. Norton it is further

176 Ordered that unless the cases were ready for reargument at or before that time, the decisions already announced

therein should stand, and the decrees drawn accordingly, unless otherwise ordered by the court, or stipulated by the parties.

177 (Order, Cause re-submitted, September 3, 1912.)

Before Judge Morris.

The United States of America,
No. 266. vs.
First National Bank of Detroit.

The above entitled cause came on to be heard upon the record as made up on the former hearing had June 26, 1912, upon which an order was made and entered June 28, 1912, and upon further proofs taken by the respective parties since that date in accordance with said order, Messrs. W. A. Norton and Gordon Cain, as counsel, appearing on behalf of the complainant, and R. J. Powell, Esq., appearing on behalf of the defendant. And the Court, having heard the arguments by counsel for the respective parties, and being fully advised in the premises, takes the matter under advisement.

178 (Order, September 16, 1912, for Final Decree.)

Before Judge Morris.

United States of America, Complainant,
vs. In Equity.
First National Bank of Detroit, Defendant.

Sixth Div. No. 356.

Fifth Div. No. 266.

United States of America, Complainant,
vs. In Equity.
Nichols-Chisholm Lumber Company, et al, Defendants.

Sixth Div. No. 559.

Fifth Div. No. 267.

United States of America, Complainant,
vs. In Equity.
Minneapolis Trust Company, et als, Defendants.

Sixth Div. No. 1184.

Fifth Div. No. 268.

The above entitled causes coming on again to be heard on the 3rd day of September, 1912, at ten o'clock in the forenoon, at Duluth, Minnesota, upon the papers formerly read, and

upon further proofs taken pursuant to the order herein entered on the 28th day of June, 1912, were argued by counsel. W. A. Norton, Esquire, and Gordon Cain, Esquire, appeared on behalf of the complainants, and R. J. Powell, Esq., appeared on behalf of the defendants. The court after hearing the arguments of counsel took the cases under advisement; and now, having duly considered the same, adheres to its decision heretofore announced on the 28th day of June, 1912, and directs that decrees be drawn accordingly.

By the Court,

PAGE MORRIS, Judge.

Dated Duluth, Minnesota,
September 14th, 1912.

179 (Petition for and Order Allowing Appeal.)

United States of America, Plaintiff,

vs.

The First National Bank of Detroit, Minnesota, Defendant.

To the Honorable Page Morris, Judge of the District Court of the United States, for the District of Minnesota:

The above named defendant, First National Bank of Detroit, Minnesota, feeling itself aggrieved by the decree and order made and entered in this cause on the 27th day of September, 1912, wherein and whereby it was and is adjudged and decreed that a certain mortgage executed by O-bah-baum (or Rose Ellis) and George Ellis, her husband, under date of July 17, 1908, to defendant, First National Bank of Detroit, Minnesota, upon the West Half of the Southwest Quarter (W $\frac{1}{2}$ SW $\frac{1}{4}$) of Section Five (5), Township One hundred forty one (141) North, of Range Thirty nine (39) West of the 5th principal Meridian, for the sum of sixty dollars (\$60), and filed for record in the office of the Register of Deeds of Becker county, Minnesota, on July 17, 1908, and recorded in Book 30 of Mortgages, page 256, is null and void, does hereby appeal to the United States Circuit Court of Appeals for the Eighth Circuit, from said decree and order, and from the whole thereof, for the reasons set forth in said Defendant's Assignment of Errors, which is filed herewith, and the said defendant prays that this its Petition for said appeal may be allowed, and that a transcript of the record, proceedings, and papers upon which said decree and order was made, duly authenticated, may
180 be sent to the United States Circuit Court of Appeals for the Eighth Circuit, sitting at St. Louis, Missouri.

R. J. POWELL,

Solicitor for Defendant, 654 Security
Bank Bldg., Minneapolis, Minn.

Dated, September 27th, 1912.

Order.

Upon consideration of the petition for appeal, it is

Ordered, that the claim of appeal therein made be and the same hereby is allowed.

It is Further Ordered, that a certified transcript of the record, testimony, exhibits, and all proceedings herein be transmitted to the United States Circuit Court of Appeals for the Eighth Circuit, within sixty days from the date hereof.

It is Further Ordered that this appeal act as supersedeas in said cause.

PAGE MORRIS, Judge.

Dated, September 27th, 1912.

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Assignment of Errors in Case No. 266.

And now, on this 27th day of September, A. D. 1912, comes the First National Bank of Detroit, Minnesota, the defendant in the above entitled cause, by its Solicitor, R. J. Powell, and says that the decree entered in the above entitled cause on the 27th day of September, A. D. 1912, is erroneous and unjust to the defendant, for the reasons now immediately herein-after set forth, which are hereby assigned as error, and upon which said defendant will rely on its appeal from said decree to the United States Circuit Court of Appeals for the Eighth Circuit, to-wit:

I.

The court erred in finding and decreeing that a certain mortgage executed by O-bah-baum (or Rose Ellis) and George Ellis, her husband, under date of July 17th, 1908, in favor of the defendant herein, the First National Bank of Detroit, Minnesota, upon the West Half of the Southwest Quarter ($W\frac{1}{2}SW\frac{1}{4}$) of Section Five (5), Township One hundred and forty one (141) North, of Range Thirty nine (39) West of the Fifth Principal Meridian, (the same being the land and the mortgage thereon, as described in the complaint herein), for the sum of sixty dollars (\$60), filed July 17th, 1908, in the office of the Register of Deeds of Becker County, Minnesota, and there recorded in Mortgage Book 30, page 256, is null and void.

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II.

The court erred in finding and deciding in said decree that O-bah-baum (or Rose Ellis) had no right or authority to mortgage said premises described in the complaint herein.

III.

The court erred in finding and deciding in said decree that O-bah-baum (or Rose Ellis) was, at the time of the execution of the mortgage described in the bill of complaint herein, a full-blood Indian of the Chippewas of the Mississippi on the White Earth Reservation, state of Minnesota.

IV.

The court erred in finding and deciding in said decree that O-bah-baum (or Rose Ellis) held at the time of the execution of the mortgage described in the complaint herein, the land embraced in said mortgage, to-wit: The West Half of the Southwest Quarter ($W\frac{1}{2}SW\frac{1}{4}$) of Section Five (5), Township One hundred forty one (141) North, of Range Thirty nine (39) West, in trust for the Government of the United States of America.

V.

The court erred in ordering and decreeing that the defendant, First National Bank of Detroit, Minnesota, should discharge said mortgage on the records forthwith, and that in the event of failure on the part of defendant so to do, said decree might be recorded and have the same force and effect as a voluntary discharge of said mortgage by defendant.

VI.

The court erred in not making and rendering a decree in favor of the defendant and against the complainant, adjudging and decreeing that the land described in the complaint herein, to-wit: The West Half of the Southwest Quarter ($W\frac{1}{2}SW\frac{1}{4}$) of Section Five (5), Township One hundred forty one (141) North, of Range Thirty nine (39) West, was, at the time of the execution of the mortgage referred to in the Bill of Complaint herein, the property of O-bah-baum (or Rose Ellis), and that she was the owner in fee simple of said land, with full and unrestricted power to mortgage, encumber, convey or otherwise dispose of the same.

VII.

The court erred in not dismissing the Bill of Complaint herein for want of equity on the part of complainant to maintain this action, in that it appeared from the evidence and stipulated facts that said mortgage or conveyance of the land described in the complaint herein was fairly and freely made, in good faith, for a full and adequate consideration, which consideration had not been returned to defendant, nor any attempt or

offer made by complainant to restore the same and place the parties to said transaction in statu quo.

VIII.

The court erred in not dismissing the Bill of Complaint herein for want of equity, on the part of complainant, in that it appeared from the evidence and the stipulated facts that said complainant had not sufficient interest in the land described in said complaint to maintain this action in its own name and right.

IX.

The court erred in not finding and deciding that the land described in the Bill of Complaint, and embraced in said mortgage, was allotted in severalty to O-bah-baum (or Rose Ellis) pursuant to the act of January 14th, 1889, 25 Stats. 642, commonly called the "Nelson Act," free from the restrictions of the act of February 8th, 1887, 24 Stats. 388, commonly called the "General Allotment Act," upon the right to convey, sell, encumber or otherwise dispose of said property.

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X.

The court erred in not dismissing the Bill of Complaint herein for want of equity on the part of complainant to maintain this action in that, if the allegations of said complaint were taken as true, complainant had no cause of action for the reason that a pretended conveyance (or mortgage) of said land, made by defendant having no color of title thereto, could not constitute a cloud upon the title to said land, nor give to the complainant any right to relief in equity.

Wherefore, said defendant prays that the decree and order of said District Court of the United States, District of Minnesota, Fifth Division, be in all things reversed, and such order and decree made by said Circuit Court of Appeals as ought according to equity to have been made in the premises in the first instance.

R. J. POWELL,
Solicitor for Defendant, 654 Security
Bank Bldg., Minneapolis, Minn.

Dated, September 27th, 1912.

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Waiver of Bond.

The United States of America, Plaintiff,
Old No. 356. vs. Sixth Div.
New No. 266.

The First National Bank of Detroit, Minnesota, Defendant.

The United States of America, Plaintiff,
Old No. 559. vs. Sixth Div.
New No. 267.

The Nichols-Chisolm Lumber Company, Minneapolis Trust
Company, and Hiram R. Lyon, Defendants.

The plaintiff in each of the above entitled actions, hereby waives the giving or filing of a supersedeas or other bond by the above named defendants in their respective appeals to the United States Circuit Court of Appeals of the Eighth Circuit, from those certain decrees and orders of the above named District Court of Minnesota, dated September 27th, 1912, and consents that said appeals shall have the same force and effect as if all requirements relative to bonds on appeal had been complied with.

Dated, September 27th, 1912.

CHAS. C. HOUP, T,
Attorney for United States
of America, Complainant.

186 (Stipulation as to Defendant's Exhibit 5.)

United States of America, Plaintiff,
No. 276. vs. In Equity.

The First National Bank of Detroit, Minnesota, Defendant.

It is stipulated and agreed by and between the respective parties to the above entitled cause, through their solicitors and counsel, that the Clerk of this Court, in his return to the Circuit Court of Appeals, upon the appeal of the above entitled cause, may omit from such return all of defendant's Exhibit 5, except the title of such exhibit, and the headings of the table of persons having less than 4/4 of Indian blood, the names of the allottees mentioned in Defendant's Exhibits 6 to 11, inclusive, and Government's Exhibits D to H, inclusive, together with the allotment numbers, figures showing degree of Indian blood and other information contained in such table opposite such names, also the certificates of the persons preparing such roll, together with the approval of the Commissioner of Indian Affairs and the Secretary of the Interior, appearing on pages 38 and 39 of such exhibit.

CHAS. C. HOUP, T,
Attorney for the Government.

R. J. POWELL,
Attorney for the Defendant.

187 (Stipulation for printing of Record in Circuit Court
of Appeals.)

United States of America, Complainant,
No. 266. vs. In Equity.
First National Bank of Detroit, Minnesota, Defendant.

United States of America, Complainant,
No. 267. vs. In Equity.
Nichols Chisolm Lumber Company, et al., Defendants.

United States of America, Complainant,
No. 268. vs. In Equity.
Minneapolis Trust Company, et al., Defendants.

The above entitled causes having been appealed to the United States Circuit Court of Appeals for the eighth circuit, it is hereby stipulated and agreed by and between the parties to the said causes that the record upon said appeals shall be printed by and under the direction of the Clerk of the Circuit Court of Appeals for the Eighth Circuit.

CHAS. C. HOUPPT,
Solicitor for Complainant.

M. C. BURCH,
Of counsel for Complainant.

R. J. POWELL,
Solicitor for Defendants.

188 (Citation in Case No. 266.)

United States of America, to the United States of
America and Chas. C. Houpt, solicitor for com-
plainant—Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to an order allowing an appeal filed in the Clerk's Office of the United States District Court, Fifth Division, wherein the First National Bank of Detroit, Minnesota is defendant and appellant, and you are the complainant and appellee, to show cause, if any there be, why the decree rendered against the said First National Bank of Detroit, Minnesota as in said appeal mentioned should not

be corrected, and why speedy justice should not be done the parties in that behalf.

Seal	Witness, the Honorable Page Morris,
U. S. District Court	Judge of said District Court this
Fifth Division	27th day of September A. D.
Dist. of Minnesota.	1912.

PAGE MORRIS,
Judge of the District Court.

Due Service of the foregoing Citation by Copy at Duluth, Minnesota is hereby admitted this 27th day of September, 1912.

CHAS. C. HOUP,
Solicitor for Complainant.

Filed in the District Court on Sept. 28, 1912.

189 (Proceedings in case of United States of America vs. Nichols-Chisolm Lumber Company, et al., No. 267.)

Praecipe for Transcript.

To the Clerk of Above Named Court :

Please certify to the clerk of the Circuit Court of Appeals Eighth Circuit upon the appeal of the above cause, the bill, answer of the Nichols-Chisolm Lumber Company, Stipulation for taking testimony and order upon same, report of master containing complainant's exhibits, "A" and "B" and defendant's Exhibit "1", the decision of the Court decree and all papers filed in said cause subsequent to Sept. 3, 1912.

R. J. POWELL,
Solicitor for defendants.

CHAS. C. HOUP,
Solicitor for Complainant.

190 (Bill of Complaint in Case No. 267.)

No. 559.

In the Circuit Court of the United States for the District of Minnesota, Sixth Division. In Equity.

To the Judges of the Circuit Court of the United States for the District of Minnesota.—In Equity.

George W. Wickersham, Attorney General of the United States for and on behalf of the United States of America, Com-

plainant herein, brings this Bill of Complaint against Nichols-Chisolm Lumber Company, Minneapolis Trust Co. and Hiram R. Lyon, Defendants, and thereupon complaining says:

First.

That Defendants are residents and citizens of the District and State of Minnesota; that defendant Nichols-Chisolm Lbr. Co. is a corporation organized and existing under the laws of the State of Minnesota, with its principal place of business at Frazee in said State, that the Minneapolis Trust Company is a corporation organized and existing under the laws of the State of Minnesota, with its principal place of business at Minneapolis in said State.

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Second.

That at all times heretofore since the acquisition of the territory comprised within said state and district by it, said Complainant has been and still is seized and possessed in fee simple of a certain parcel of land described as E $\frac{1}{2}$ of SE $\frac{1}{4}$ of Section 9, Township 142 North, Range 38 West of the Fifth Principal Meridian, of the value of \$2000. and upward, in the County of Becker,

within said District of Minnesota, as a part of its public domain and has at all times heretofore exercised and still does exercise through the proper department of its Government sovereign power and authority over said lands and control of the management and disposition of the same.

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Fourth.

Your Orator further shows that application was made to Complainant through its proper officers duly entrusted and charged with such affairs by Bay-bah-mah-ge-wabe, an Indian of said tribe or band, for such an allotment embracing said described parcel of land; that the same was duly approved by said officers and that what is commonly known as a trust patent was on February 6, 1908, executed to said Indian, by which the allotment of said described parcel of land to him became complete; and Complainant shows in connection with the proceedings last above mentioned, and particularly with said patent, that it merely promised therein, without consideration, to preserve said described parcel to said Indian named for a period of years in trust for sole and only benefit and use, with the provision that thereafter, after twenty-five years from the execution of said trust patent, the

same might be, at the discretion of the President of the United States, at some time conveyed to said Indian in fee simple.

Fifth.

Your Orator further shows that by the courtesy and grace of Complainant, but without having given any consideration in law whatsoever therefor, said allottee had by such trust patent accorded to[—] a right to the personal use and occupancy of said allotted parcel of land as a home for [—] during the period of twenty-five years, as hereinbefore stated, and might at the end of said period have been granted a patent in fee simple to said parcel, but did not have, either at law or in equity, any right, title or interest, claim or demand, upon, in, or to said parcel of land which [—] could assign, alienate, encumber, or in manner convey or have conveyed by any other person for [—] as legal representative in [—] name, place and stead, or in, by, under, or through the order of any court or person claiming to act as the officer of any court to any other person or persons whomsoever, against the right and title of Complainant hereinbefore in this Bill asserted, but your Orator shows that said Indian mistook [—] rights and privileges as allottee and grantee in said so-called trust patent and, assuming that said allotment and said trust patent were equal, or at least similar to the ownership and possession of a person having a title to land in fee simple, sought to encumber and convey said parcel of land, as will hereinafter more fully appear.

193 That on October 11th, 1909, the said Merchants Loan & Investment Company, a corporation, executed to Hiram R. Lyon a so-called warranty deed covering the said described parcel of land, and other land not herein involved, for an alleged consideration of three hundred and twenty dollars which said deed was on October 15, 1909, filed in the office of the said Register of Deeds and thereafter duly recorded on page 56 in Deeds book 15;

And your Orator further shows that the only instruments at present existing against the said described parcel of land are the pretended timber deed executed on October 21, 1907, to Nichols-Chisolm Lbr. Co. defendant, the pretended mortgage executed on July 2, 1909, to the Minneapolis Trust Co., defendant, and the pretended warranty deed executed on October 11, 1909, to Hiram R. Lyon, defendant, the other conveyances above set forth having been described for the purpose of fully placing of record in this suit all transactions in which said described parcel of land has erroneously and wrongfully become involved.

194

Sixth.

And your Orator avers that neither by the allotment mentioned and herein described, nor by the so called trust patent, nor in any other manner, did the said allottee acquire from Complainant any vested rights to said land assignable or transferable by [—] or by anybody else for [—] to any other person or persons, partnership, corporation or other party whomsoever or whatsoever, or any title whatever by which [—] or [—] legal representatives could divest or could deed, mortgage or otherwise convey or alien the same, and that any assumption or pretension of authority or power over said land by or on account of Complainant's said allotment or trust deed to said allottee by any person whomsoever save a properly constituted and authorized officer of this Complainant, was and is without authority of law or foundation in equity, and that every and all conveyances, liens, taxes or other claims asserted or pretended as against said land, are wholly void and ineffectual and have at all times been so, and ought not to be recognized or tolerated by this Court, and that any mortgage, discharge of mortgage, deed, or paper connected therewith, in or out of any court of the State of Minnesota respecting said parcel in any manner is an invasion of and interference with the sovereign rights of Complainant in the premises and constitutes a cloud upon the title of Complainant's property in said parcel of land and directly tends to deteriorate the same in value and impedes its full and unrestricted control and possession of and supervision over said land and ought in equity and by the decree of the Judges of this Court to be removed and the title to Complainant be quieted.

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Seventh.

And your Orator further shows that said lands are not improved and occupied as in the case of ordinary farms, but are in the main open and unoccupied, but that Complainant is in such occupancy as is presumed in law and in equity from absolute ownership and the right to use at all times in accordance with its sovereign pleasure, and especially as against any pretended rights that can be asserted and maintained by said Defendant, and your Orator specially avers that the interests of Complainant as such owner, as well as guardian of the Indians of said White Earth Band of the Chippewa tribe, entitles it, Complainant, to the free, unrestricted and complete occupancy of said parcel, and the Defendant, or any party or parties whatsoever, claiming the right to such occupancy in, by, under, or through said Defendant, should by the Order and

Decree of this Court be perpetually restrained from interfering with such Complainant's rights.

196 And your Orator further shows that he is informed and believes and therefore charges that the parcel of land hereinbefore described, and which mainly constitute the subject matter of this suit, at the time of such allotment as hereinbefore described, was covered with pine and other variety of trees and timber of great value, but of what precise value your Orator is unable to state, which the said allottee was not authorized or in any manner entitled or empowered to waste by reason of such allotment; that the said Defendant in obtaining pretended conveyances of said land intended and pretended to have the right to cut and remove the same and to a large extent done so, but to what precise extent your Orator is unable to say; but your Orator charges that Complainant is entitled to the full market value of such trees and timber or the lumber manufactured therefrom as having lost the same to the Defendant through such illegal and inequitable spoliation and waste and it therefore becomes and is the duty of the Defendant hereto and herein named to properly account for and pay over to the Complainant the value of all and singular such trees, timber or manufactured lumber under the proper Order and direction of this Honorable Court.

And your Orator further shows that he justly fears that said defendants intend to further cut and remove such timber and despoil the land of the same and thereby cause greater loss and irreparable damage to Complainant by and through such acts, and that Complainant is justly and equitably entitled to have defendants restrained from such unconscionable, illegal and inequitable conduct by Order of this Honorable Court whenever your Orator shall find it important and necessary to apply therefor, either during the pendency of this suit or at the time of final Decree herein; and have such relief without amendment to this Bill of Complaint or additional petition thereunto.

197 Forasmuch, therefore, as Complainant is remediless in the premises at and by the strict rules of the Common law and is only relievable in a Court of Equity where matters of this kind are properly cognizable and relievable; and to the end that Complainant may have that relief to which it is entitled and that the defendant herein named may answer the premises, but not on oath or affirmation, such manner of answer being hereby expressly waived, your Orator prays:

That the said defendant be required to answer relative to the cutting and removing of the trees and timber so cut and

removed from said land, and state what manner of disposition has been made of the same, and if any of said timber has been manufactured, the quantity of lumber manufactured therefrom, and if still in the form of logs and unmanufactured, state where same are located, and pay over to the Court for the benefit of Complainant herein the full value thereof, or restore same to the Complainant, as may seem most proper and just under the Order, direction and Decree of this Honorable Court:

And your Orator further prays that Complainant may have an injunction issued out of and under the seal of this Honorable Court commanding the said defendant, attorneys, agents or employes to refrain and desist from further cutting, removing or otherwise disposing of the trees and timber which remain standing upon said land, or logs remaining upon said land which may have been cut from said trees or timber, or lumber manufactured therefrom, and this under such reasonable and certain penalties and conditions as to this Honorable Court may seem most just and proper in the premises:

And your Orator further prays that the various conveyances and incumbrances hereinbefore described, in so far as they affect the said described parcel of land or the timber thereon, be set aside and held for naught as clouds upon Complainant's title thereto; that the title of Complainant to said land be quieted and settled, and that Complainant be left in the peaceable and undisturbed possession thereof [bu] Order and Decree of this Honorable Court.

198 And that Complainant may have from this Honorable Court such other and further relief in the premises as the circumstances may seem to require and as may be found agreeable to Equity and good conscience.

May it please your honors to grant unto the Complainant the right of subpoena to be issued out of and under the seal of this Honorable Court directed to the said defendants, Nichols-Chisolm Lumber Company, Minneapolis Trust Company and Hiram R. Lyon, commanding them to appear in this court on a day certain therein to be named and then and there stand to and abide by such order, judgment and decree herein

as to your honors shall seem meet and proper; and your orator will ever pray.

GEORGE W. WICKERSHAM,
Attorney General of the United States.

CHAS. C. HOUPPT,
United States District Attorney for the District
of Minnesota, and Solicitor for Complainant.

Marsden C. Burch
Eugene H. Long
Arthur M. Seekell
Wm. A. Norton
Of counsel.

199 (Answer of Nichols-Chisolm Lumber Co.)

The answer of Nichols-Chisolm Lumber Company, one of the defendants above named, to the Bill of Complaint of George W. Wickersham, Attorney General of the United States, for and in behalf of the United States of America, Complainant.

This defendant now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception, or otherwise, that can or may be had or taken to the many errors, uncertainties and other imperfections in the said Bill contained, for Answer thereto, or to so much and such parts thereof as this defendant is advised it is material or necessary for it to make answer unto, answering, says:

1st: This defendant denies all of the allegations set forth in the second paragraph in said Bill, and on the contrary this defendant alleges that the Complainant herein has not been in possession of the lands described in said second paragraph of said Bill in any manner, nor has the said Complainant been seized or possessed of said parcel of land in fee simple, or otherwise, for more than thirty years last past; and the said parcel of land is not now, and for more than thirty years last past has not been any part of the public domain.

2nd: This defendant denies each and every allegation, matter and thing in the third paragraph of said Bill of
200 Complaint contained, as the same is therein set forth, and on the contrary this defendant alleges that the territory comprised within what is known as the White Earth Reservation, in the state of Minnesota, was originally a portion of the territory over which the Indians of the Chippewa Nation exercised dominion, and that it continued to be a part of the Indian country and exclusively under the dominion,

use and occupancy of the Chippewa Nation of Indians until it was ceded to the United States of America by certain Treaties entered into between the Government of the said United States and said Chippewa Indians in the year 1865, and prior years. By the said several Treaties entered into between the Chippewa Indians and the United States of America, there were reserved for the Mississippi Bands of said Chippewa Indians, certain lands and territory situated in the state and district of Minnesota, which lands were, by said Treaties, fully and completely confirmed and established as the property of said Indians. That thereafter and on March 19th, 1867, a Treaty was entered into between the Complainant herein and the Mississippi Bands of Chippewa Indians, wherein and whereby the said Complainant, United States of America, in consideration of the relinquishment and transfer to the said Complainant of the Reservations theretofore set apart and conveyed to said Indians, did then and there convey, transfer and set over unto said Bands of Indians all of the territory comprised within the limits of the White Earth Reservation, and did thereafter duly proclaim and confirm the said Treaty. Pursuant thereto the Indians of the Mississippi Bands of Chippewas entered upon and took up their residence within the boundaries of said White Earth Reservation, and ever since said time the White Earth Reservation has been occupied, used and enjoyed by the said Mississippi Bands of Chippewas as their homes, and the said Indians have ever since said period, and are now in the exclusive use and enjoyment thereof. This defendant admits that the United States of America has passed Sundry laws relating to the government of Indian tribes and affairs, and has thereby provided for the taking of allotments in severalty by individual Indians upon said several Reservations, and particularly to the taking of allotments by Indians residing upon the White Earth Reservation, and has from time to time provided methods whereby Indians might sever their tribal relations and take a portion of the tribal property in severalty, and this defendant admits that in accordance with such laws and regulations, many of the Indians belonging to the Mississippi Bands of Chippewas in the state of Minnesota, and residing upon the White Earth Reservation, have selected portions of their lands as allotments in severalty, and have to that extent complied with and recognized said several acts, laws and regulations of Congress relating thereto, but this defendant denies that the granting of such allotments by the Complainant has been an act of grace, or that the Indians so selecting the same have obtained such allotments, without consideration, and on the contrary allege that the property so selected by the Indians in severalty

was at all times since the adoption of the Treaty in 1867, hereinbefore referred to, the sole property of said several bands of Indians jointly, of which the Indians selecting such allotments were members, and that upon the selection of such allotments the Indians in each and every case acquired a full and complete title in fee simple, any and all provisions in the acts and regulations of Congress to the contrary notwithstanding.

3rd: This defendant admits that the lands described in the Bill of Complaint herein were selected by Bay-bah-mah-ge-wabe as in the Bill of Complaint set forth, and that the same was approved and a trust patent issued as therein alleged, but this defendant denies that said trust patent was without consideration, or that the same was of any greater or other force and effect than a recognition of said selection in severalty by said Indian, of property which he previously owned in common as a member of said band.

202 4th: Further answering, this defendant at all times denying the title or interest of the Complainant in said premises, and denying that the allottee of said parcel of land acquired the same merely by the grace and courtesy of Complainant, and had no other or greater interest therein than a mere license to use the same, admits that the instruments described in the fifth paragraph of the Bill of Complaint were executed and recorded.

5th: This defendant denies that the conveyance by said Bay-bah-mah-ge-wabe, and said several conveyances described in the Bill, are void, or of no effect, or that the same are in any manner an invasion of, or interference with the sovereign rights of the Complainant in the premises, or that the same, or any of them, constitute a cloud upon the title of Complainant's property in said parcel of land, and denies that the Complainant has any right whatever to the control or possession thereof, or supervision over the same. This defendant denies that the lands described in said Bill of Complaint are in the main vacant and unoccupied.

6th: Further answering, this defendant alleges and avers that the said Bay-bah-mah-ge-wabe mentioned in the Bill of Complaint herein, and who selected as his allotment in severalty the premises therein described, is a mixed-blood Chippewa Indian, and not an Indian of the full-blood, and that he is one of the class of Indians referred to in the act of Congress relating to the Chippewa Indians on the White Earth Reservation, in the state of Minnesota, approved June 21, 1906, and the further act of Congress relating thereto, approved March 1, 1907, and that by virtue of said acts of Congress

said allottee, described and referred to in the Bill of Complaint, is and was wholly emancipated and removed from the pretended control or supervision of the Complainant, United States of America, and was thereby fully authorized and empowered to manage his own affairs and control and dispose of his own property, including the allotment in question, to the same extent [an-] with the same force and effect as though he had been a full citizen of the United States and state of Minnesota, and a person wholly of the white blood. This defendant further alleges in that behalf that the timber on the premises in controversy was conveyed by the said allottee and his wife to this defendant for a full and fair consideration, and that at the time of the execution of said conveyance by said allottee and his wife, said allottee made oath to the fact that he was a mixed-blood Chippewa Indian, and of the class mentioned in said several acts of Congress, and this defendant, in purchasing the said timber, was advised of that fact, and had no knowledge or information to the contrary, nor means of readily ascertaining the true facts with relation thereto, and did in all things fully rely upon the affidavit and representations made by said allottee at the time of the execution of his said conveyance to this defendant, and did purchase the said timber in good faith, fully believing that the said allottee had full right and authority under said several acts of Congress to convey the said property, and did pay therefor the full and fair value of said timber. That the allottee has not returned the consideration received for his said conveyance, nor offered to return the same, nor to place the parties in any manner in statu quo, nor has the Complainant, in its assumed role of pretended Guardian of said Indian, or Indians, offered or attempted in any manner to refund the payment so made to the allottee, pursuant to his said representations, or to in any manner secure such refundment, or protect this defendant from loss by reason of the acts complained of.

7th: Further answering, this defendant at this time denies the right of the Complainant to require this defendant to account in any manner for timber now upon the said premises, or which may have been thereon at the time of the purchase thereof from said Bay-bah-mah-ge-wabe, and alleges that by reason of the facts hereinbefore set forth, the existence of timber upon said premises is wholly immaterial.

But, if the court shall hereafter decide that the conveyance, under which this defendant claims title to the said premises is invalid, and that this defendant has no rights or equities therein, then and in that case, this defendant will be prepared and willing to account for any timber which may have been cut or removed from said premises, and for which it

is in any manner responsible, at such time and in such manner as the court may direct.

205 Wherefore, This defendant having fully answered, confessed, traversed and avoided or denied all of the matters in the said Bill of Complaint material to be answered, according to its best knowledge and belief, humbly prays this honorable court to enter its judgment that this defendant be hence dismissed, with its reasonable costs and charges in this behalf most wrongfully sustained, and for such other and further relief in the premises as to this honorable court may seem meet and in accordance with equity.

R. J. POWELL,

Solicitor for Defendant, 312-14 Lumber Exchange
Bldg. Minneapolis, Minn.

206 (Stipulation for Appointment of Examiner and Taking of Testimony, Etc.)

And now comes the said Complainant, by Charles C. Houpt, United States Attorney for said District, and Solicitor herein, and the undersigned of counsel for Complainant; and R. J. Powell,, Solicitors for said Defendant, and of counsel; and hereby stipulate and agree for and in behalf of the said parties respectively,—

First: That the evidence in this suit shall be taken orally and without giving the usual formal notice to that effect provided for in Equity Rule No. 67.

Second: That by authority and with the consent of the Court, or Judge at chambers, such testimony shall be taken before an Examiner to be specially appointed by said Court or Judge at Chambers, said examiner to be a skillful stenographer, and the testimony so taken stenographically shall be by such examiner put into typewriting.

The testimony of each witness after such reduction to writing shall be deemed and treated as the official testimony and evidence in the case without being signed by the respective witnesses or the examiner in their stead.

Third: Any written stipulation between solicitors or counsel of the respective parties as to any matter or thing being deemed as true or to be considered by the Court as evidence in the cause may be filed with such examiner and returned by him as evidence in the cause, to be treated and considered by the Court the same as though taken by such examiner in the regular way; and no charge shall be made for such filing and return of such written stipulation, except for noting the same

in the record and for such copies as may be requested by either party.

207 Fourth: That the Order of the Court, or Judge at chambers, appointing such special examiner shall only empower such examiner to take such testimony, depositions, etc, and extend such portions thereof that are not in writing, and report the whole thereof to the Court to be used upon the trial of the cause.

Fifth: The evidence so taken shall, unless the time shall be extended by agreement between the solicitors and counsel for the respective parties, or by Order of Court, be as follows:

The Complainant's evidence, in chief, shall be adduced and completed within sixty days from the date of the Order of this Court, to be based upon this stipulation; the evidence for the Defendant shall be adduced and completed within ninety days from the expiration of the aforesaid sixty days, or the conclusion of Complainant's proofs; the evidence, if any, offered by Complainant in rebuttal shall be adduced and completed within ninety days from the expiration of the time above allotted to the Defendant, or the conclusion of the proofs of Defendant.

Sixth: When the evidence is so taken and reduced to type-writing, either party may procure a copy, or copies, of all such evidence, or such portions thereof as may be desired, upon such terms as may be agreed upon with the examiner; and publication of the testimony may pass into the Clerk's office upon the mere filing of the examiner's return, without formal notice or order.

CHARLES C. HOUPt,
Solicitor for Complainant.

M. C. BURCH,
Of Counsel for Complainant.

R. J. POWELL,
Solicitor for Defendant.

208 (Order appointing Special Examiner, etc.)

On reading and filing the annexed stipulation, and it appearing by the files and records that this cause is at issue, and on motion of Charles C. Houpt, Solicitor for Complainant, and R. J. Powell, solicitor for Defendant, that the Court appoint some qualified person within said district to act as examiner of this Court to take orally such depositions, evidence and testimony as the parties hereto desire to be taken, in accordance with the rules of practice and the terms of said stipulation, at

such suitable place or places within said district as may be designated by the solicitors or counsel of the respective parties from time to time.

It is therefore ordered that such testimony shall be taken before an examiner, to be hereinafter named, and the testimony so taken stenographically by him shall be put into typewriting; that the testimony of each witness after such reduction to writing shall be deemed and treated as the official testimony and evidence in the case without being signed by the respective witnesses, or the examiner in their stead; that any written stipulation between solicitors or counsel of the respective parties as to any matter or thing being deemed as true, or to be considered by the Court as evidence in the cause, may be filed with such examiner and returned by him as evidence in the cause, to be treated and considered by the Court the same as though taken by such examiner in the regular way, and no charge shall be made by such examiner for such filing and return of such written stipulation, except for noting the same in the record, and for such copies as may be requested by either party; that such examiner shall, after taking such testimony, depositions, etc., extend such portions thereof as are not in writing, and then report the whole thereof to the Court to be used
209 upon the trial of the cause; that the evidence so taken shall, unless the time shall be extended by agreement between the solicitors or counsel for the respective parties, or by Order of Court, be as follows:

Complainant's evidence, in chief, shall be adduced and completed within sixty days from the date of this Order; that the evidence for the Defendant shall be adduced and completed within ninety days from and after the expiration of the aforesaid sixty days, or the conclusion of the proofs of Complainant; that the evidence, if any, offered by Complainant in rebuttal, shall be adduced and completed within ninety days from the expiration of the time above allotted to the Defendant, or the conclusion of the proofs of Defendant.

When the evidence is so taken and reduced to typewriting, either party may procure a copy, or copies, of all, or such portions thereof as may be desired, upon such terms as may be agreed upon with the Examiner, and no formal publication of the testimony is necessary; and

It is further ordered that Mr. J. J. Cameron of Bemidji, Minnesota, be, and he is hereby appointed a Special Examiner of this Court, with power and authority to take and transmit to this Court such evidence, depositions and testimony in this cause as the parties hereto desire to be taken, at such places

within this district and at such times as may suit the convenience of said Examiner and the parties hereto, conforming, however, as nearly as practicable, to the times hereinbefore named for such taking; and that said Examiner extend such portions thereof as are not in writing, and then report the whole thereof, with all convenient speed, to this Court, said testimony, when so taken, to be used upon the trial of this cause.

PAGE MORRIS, Judge.

Dated this 15th day of April, 1912.

210

(Report of Special Examiner.)

The above entitled cause was regularly brought on for the taking of testimony, before J. J. Cameron, Esquire, Special Examiner, pursuant to the order of the Court heretofore made herein, on the 24th day of June, A. D., 1912, at 512 Federal Building, Minneapolis, Minnesota; Charles C. Houpt, Esquire, United States District Attorney, and Messrs. W. A. Norton and Gordon Cain, appeared on behalf of the Government, and R. J. Powell, Esquire, of Minneapolis, Minnesota, appeared on behalf of the defendants;

Whereupon the Government offered in evidence Government's Exhibit A., which was received in evidence without objection, except as to materiality, competency and so forth, but not as to the manner of establishing the Government's case.

Whereupon the Government offered in evidence Government's Exhibit B., which was received in evidence without objection, it being conceded that it is a true copy of the Trust Patent named in the Bill of Complaint herein as having been issued to the allottee therein named.

Whereupon the Government rested its case.

210½

For the Defense.

Whereupon Defendants' Exhibit 1 was offered and received in evidence without objection.

Whereupon the Defendants rested their case.

211

(Certificate of Special Examiner.)

I, J. J. Cameron, Special Examiner, appointed by the Court to take and report to the court the proceedings and evidence offered in the above entitled action, do hereby certify that under and by virtue of such order I did, on the 24th day

of June, A. D. 1912, take in shorthand all the proceedings had before me, and I do hereby report same to the Court.

Dated June 27th, 1912.

J. J. CAMERON,
Special Examiner.

212 (Government's Exhibit A, Stipulation as to Certain Facts.)

It is hereby stipulated and agreed by and between the respective parties to the above entitled cause, through their respective solicitors and counsel, that the following facts are deemed to be true for the purposes of the trial and decision of this cause:

First: That the land involved in this cause and described in the bill of complaint is situated within, and comprises a part of what is denominated and known as the White Earth Reservation in the State of Minnesota.

Second: That Bay-bah-mah-ge-wabe, referred to in the bill of complaint as the allottee, an Indian, then belonging to, and a member of one of the bands of Chippewa Indians residing on the White Earth Reservation, exercising rights and privileges as such member, drawing annuities, etc., selected in allotment the land described in the bill of complaint; that such selection was duly approved by the proper officers of the Government and afterwards, to-wit, on February 6, 1908, what is commonly known as a trust patent was duly issued to said Indian in accordance with (it is claimed) the provisions of Section 5 of the Act of Congress approved February 8, 1887 (24 Stats. L., 388):

213 That on, to-wit, August 17, 1907, the said Bay-bah-mah-ge-wabe (or Jim Jacobs) and Ah-go-be-naunce, his wife, executed to the Nichols-Chisolm Lumber Company a so-called Agreement to Sell Timber, assuming to convey to it the timber on the land described in the bill of complaint, for an alleged consideration of seventy-five dollars (\$75.00), which said deed was on, to-wit, August 28, 1907, filed in the office of the Register of Deeds for Becker County, Minnesota, and thereafter duly recorded in Book 'J' on page 315:

That on, to-wit, October 21, 1907, the said Bay-bah-mah-ge-wabe (or Jim Jacobs) and Ay-go-ge-henais, his wife, executed to the said Nichols-Chisolm Lumber Company, a defendant herein, a so-called Timber Deed, assuming to convey to it the timber on the land described in the bill of complaint, for an alleged consideration of three hundred dollars (\$300.00), which said deed was on, to-wit, October 21, 1907, filed in the office

of the said Register of Deeds and thereafter duly recorded in book 'L' on page 68:

That on, to-wit, September 2, 1908, the said Bay-bah-mah-ge-wabe (or Jim Jacobs) and Ah-go-ge-be-nais, his wife, executed to the Merchants Loan & Investment Company a so-called Warranty Deed, assuming to convey to it the land described in the bill of complaint, for an alleged consideration of forty dollars (\$40.00), which said deed was on, to-wit, September 2, 1908, filed in the office of the said Register of Deeds and thereafter duly recorded in Deeds book 33 on page 341:

That on, to-wit, October 11, 1909, the said Merchants Loan & Investment Company executed to Hiram R. Lyon, a defendant herein, a so-called Warranty Deed, assuming to convey to him the land described in the bill of complaint, and other land, for an alleged consideration of three hundred and twenty dollars (\$320.00), which said deed was on, to-wit, October 15, 1909, filed in the office of the said Register of Deeds and thereafter duly recorded in Deeds book 15 on page 66:

214 That on, to-wit, July 2, 1909, the said Nichols-Chicolen Lumber Company, a defendant herein executed to the Minneapolis Trust Company, a defendant herein, a so-called Mortgage covering the land described in the bill of complaint, and other land, for an alleged consideration of one million, five hundred thousand dollars (\$1,500,000.00), which said mortgage was on, to-wit, July 15, 1909, filed in the office of the said Register of Deeds and thereafter duly recorded in Mortgage book 35 on page 342:

That no subsequent or other transfers or encumbrances appeared of record at the time of the filing of the bill of complaint, at which time a notice of Lis Pendens was duly filed.

CHARLES C. HOUPPT,
Solicitor for Plaintiff.

M. C. BURCH,
Counsel for Plaintiff.

R. J. POWELL,
Solicitor for Defendants.

.....
Counsel for Defendants.

215 (Government's Exhibit B, Trust Patent issued to Bay-bah-mah-ge-wabe.)

The United States of America,

To all to whom these Presents shall come,—Greeting;

Whereas, There has been deposited in the General Land Office of the United States a schedule of allotments approved by the Secretary of the Interior September 13, 19107, whereby it appears that Bay-bah-mah-ge-wabe, an Indian of the Otter Tail Pillager Chippewa been allotted the following-described land, east half of the south-east quarter of section nine in township one hundred and forty-two north of range thirty-eight west of the Fifth Principal Meridian, Minnesota,

Now Know Ye, that the United States of America, in consideration of the premises, has allotted, and by these presents does allot, unto the said Bay-bah-mah-ge-wabe the land above described, and hereby declares that it does and will hold the land thus allotted (subject to all statutory provisions and restrictions) for the period of twenty-five years, in trust for the sole use and benefit of the said Bay-bah-mah-ge-wabe or in case of his decease, for the sole use of his heirs, according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs, as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: Provided, That the President of the United States may, in his discretion, extend the said period.

In Testimony Whereof, I, Theodore Roosevelt, President of the United States of America, have caused these Letters to be made Patent and the Seal of the General Land Office to be hereunto affixed.

Given under my hand at the City of Washington, this sixth day of February, in the year of our Lord one thousand nine hundred and eight, and of the Independence of the United States the one hundred and thirty second.

216

By the President:

THEODORE ROOSEVELT,

By M. W. Young,
Secretary.

Recorder of the General Land Office.

Recorded Vol., p.

217 (Defendant's Exhibit 1, Stipulation as to certain Facts.)

Come now the parties to the above entitled action, by their respective Solicitors and Counsel, and for the purpose of this case only, stipulate and agree that the facts hereinafter stated

shall be deemed established and sustained by proper evidence, subject however to the objections and exceptions hereinafter noted; provided however, and it is expressly so agreed that the facts herein are agreed upon for the purpose of this case only, and that the determination and agreement upon the facts in this case shall not be held or permitted to determine or influence the determination of questions of fact in any other similar case or cases between the United States and the same or other parties, and to that end the facts deemed to be established herein are as follows:

1: That the allottee named in the Bill of Complaint, and to whom the premises in controversy were assigned by an instrument known and described as a Trust Patent, was at the time of the conveyance mentioned in the Bill of Complaint, an adult Chippewa Indian, residing upon the White Earth Reservation. That said allottee, it is agreed, had and has one sixteenth of white blood, no more and no less.

2: That the consideration for the conveyance or conveyances executed by the said allottee, and described in the Bill of Complaint, and through which the defendants herein
218 claim title, was the full and fair value of the property at the time of such conveyance or conveyances, it being stipulated that this fact is agreed upon subject to the objection on the part of the plaintiff that it is irrelevant and immaterial.

3: That at the time of the execution of the said conveyance or conveyances, the allottee represented and made oath to the fact that he was an adult mixed-blood Chippewa Indian, and the defendants paid the consideration and accepted their conveyances in reliance upon the said oath and representations of the allottee, without knowledge or information as to the truth or falsity of such representations, and without means of ascertaining the true facts with relation thereto, all of the foregoing facts being agreed upon at this time subject to the objections on the part of the plaintiff that each and every one of said facts are immaterial and irrelevant to the issues in said cause.

4: That the allottee has not returned the consideration received for his said conveyances, nor offered to return the same, nor to place the parties in any manner in statu quo, nor has the Complainant offered or attempted in any manner to refund or secure the refundment of the payments so made to the allottee, or protect these defendants in any manner, all of which facts

are agreed upon subject to the objection on the part of the plaintiff that each and every one of said facts are irrelevant and immaterial in this case.

5: It Is Further Stipulated and Agreed by and between the parties hereto, through their respective solicitors and counsel, that under the Treaty of September 30, 1854, between the United States and the Chippewa Indians of Lake Superior and the Mississippi, commonly known and referred to as the "La-Pointe Treaty," a provision was made for mixed-bloods among the Chippewa Indians, and that in the administration of Indian Affairs under said Treaty a question as to the construction of the term "mixed-blood" arose and was referred
219 by the Indian Agent at Detroit, Michigan, to the Commissioner of Indian Affairs for an opinion. That thereupon and in response to such request, the Commissioner of Indian Affairs rendered an opinion in the form of the following letter:

"Department of the Interior, Office of Indian Affairs,
June 15, 1855.

Sir: I have to acknowledge the receipt of your letter of the 9th instant, relating to reservations of land for the Chippewa Indians, under the treaty of September last, and making certain inquiries regarding the construction proper to be placed upon the seventh subdivision of the second article of that treaty.

In reply to your inquiries, I answer affirmatively the three first stated by you, that, as 'each head of a family or single person over twenty one years of age' is entitled, females over twenty one being single persons, as well as widows, heads of families, come within the treaty provision; and that the term 'mixed-bloods' has been construed to mean all who are identified as having a mixture of Indian and white blood.

The particular proportion of each blood is, therefore, immaterial, where the provision is so broad as that stated in the treaty.

As regards your fourth or last inquiry, whether claimants should be required to furnish evidence of their right before you enter their names, I have to state that you should enter all names that you shall be satisfied from proper care and inquiry are mixed-bloods according to the construction above named. But as a precautionary measure, and to guard as well the rights of the Indians as the Government, you should submit, the list, when completed, for the revision of the general

council of the Indians, and strike off or add to the names on such list in accordance with the facts therein ascertained. The Indians themselves, in council, by their own traditions and knowledge, will doubtless greatly aid in arriving at the facts regarding the ancestry of those who may claim under the provisions for mixed-bloods.

Care should be taken to note opposite each name who the person is, as to parentage or genealogy. This course will produce a record that will facilitate the action of this office in the settlement of all cases that may hereafter occur wherein questions of heirship arise, and be generally servicable to the Department.

Very respectfully, your obedient servant,

GEO. W. MANYPENNY,
Commissioner.

Henry C. Gilbert,
Indian Agent, Detroit, Mich.

220 it being understood and agreed that these facts are agreed upon subject to the objection on the part of the plaintiff that they are irrelevant and immaterial.

6: It is Further Stipulated that in the administration of the Bureau of Indian Affairs relating to the Chippewa Indians on the White Earth Reservation under the Act of June 21, 1906, and the Act of March 1st, 1907, commonly known and referred to as the "Clapp Act," and particularly with reference to the issuance of fee patents to Chippewa Indians on the White Earth Reservation, applying therefor, on the ground that they (the said Indians) were mixed-bloods, the Department has not required any statement to be submitted showing the quantum of foreign blood, but has issued such fee patents upon the showing that the applicant was a mixed-blood, it being understood and agreed that these facts are agreed upon subject to the objection on the part of the plaintiff that they are irrelevant and immaterial.

CHARLES C. HOUP, T,
Solicitor for Complainant.

WM. A. NORTON,
Counsel for Complainant.

R. J. POWELL,
Solicitor for Defendant.

In accordance with the annexed stipulation, it is by the court

Ordered, that this cause be, and the same hereby is removed and transferred from the Sixth Division of this District, where the same is now pending to the Fifth Division thereof for trial and all subsequent proceedings, and

It is Further Ordered, that the clerk of this court be, and he hereby is directed to forthwith transmit all the files and records in said cause to the Fifth Division of this District, except the order of removal in accordance with the rules of practice of this court, and

It is Further Ordered, that said cause be heard before the above named court in the Fifth Division of this District.

Dated June 26th, 1912.

PAGE MORRIS, Judge.

222

(Decree.)

The United States of America, Plaintiff,
vs.

The Nichols Chisolm Lumber Company, Minneapolis Trust
Company, and Hiram R. Lyon, Defendants.

At the January Term of the United States District Court, District of Minnesota, Fifth Division, Held at the United States Court room in the City of Duluth on the Twenty-sixth day of June, in the year of our Lord, One Thousand Nine Hundred and Twelve.

Present: Hon. Page Morris, District Judge.

This Cause came on to be further heard at the July term of said Court on the 3rd day of September, A. D. 1912, and was argued by Counsel and continued for advisement until the 14th day of September, 1912; and thereupon, upon consideration thereof it is ordered, adjudged, and decreed, as follows: That a Warranty Timber Deed executed by Bay-bah-mah-ge-wabe (described and named in the Bill of Complainant as the allottee) and Ah-ge-be-naunce his wife, unto the Nichols Chisolm Lumber Company, one of the defendants herein, October 21, 1907, to the timber then standing and being on the East half of the Southeast quarter of Section nine, Township one-forty-two North, Range thirty-eight, West of the fifth Principal Meridian, State of Minnesota; said deed having been recorded in the Office of the Register of Deeds of Becker County in Book L. of Miscellaneous Records at page 68; and that a Warranty Deed executed by the same parties for the same land unto the Mer-

chants Loan and Investment Company, one of the defendants herein, September 2nd, 1908, and recorded in the Office of the Register of Deeds of Becker County, in Deeds Book 33 at page 341, (both of said conveyances being the one set forth in paragraph five in the Bill of Complaint herein) are each and both null and void and without legal force and effect, he, [-he] said

223 Bay-bah-mah-ge-wabe having no right or authority whatsoever to so deed and convey said premises, he being then and there a full blood Indian of the Chippewas of Mississippi on the White Earth Reservation, State of Minnesota, holding said described lands only in trust for the Government of the United States of America under certain treaties and laws pertaining thereto. It is further ordered, adjudged and decreed that all other conveyances and incumbrances predicated on the foregoing described and named conveyances are null and void and without force and effect. It is further ordered, adjudged and decreed that this decree may be filed in the Office of the Register of Deeds of Becker County, State of Minnesota, and the Court doth further order and decree that the defendant, the Nichols Chisolm Lumber Company, account to the complainant for all timber which it may have cut or removed from the premises herein involved, and that should said defendant company and the complainant fail to agree upon such an accounting, it shall be [refer-ed] to one J. J. Cameron, who has heretofore acted as Special Examiner in this case to take the following accounts, that is to say: An account of all the timber so taken by the said Nichols Chisolm Lumber Company, ascertain the value thereof and that he report his findings thereon to this Court within ninety days from the date of this decree.

Dated September 27, 1912.

PAGE MORRIS, Judge

224 (Petition for and Order allowing Appeal.)

To the Honorable Page Morris, Judge of the District Court of the United States, for the District of Minnesota:

The above named defendants, Nichols-Chisolm Lumber Company, Minneapolis Trust Company and Hiram R. Lyon, feeling themselves aggrieved by the decree and order made and entered in this cause on the 27th day of September, 1912, wherein and whereby it was and is adjudged and decreed that a certain Warranty Timber Deed, executed by Bay-bah-mah-ge-wabe and Ah-go-be-naunce, his wife, unto the Nichols-Chisolm Lumber Company, one of the defendants herein, under date of Oc-

tober 21, 1907, selling and conveying the timber then standing and being on the East Half of the Southeast Quarter ($E\frac{1}{2}$ - $SE\frac{1}{4}$) of Section Nine (9), Township One hundred forty two (142) North, of Range Thirty eight (38) West of the 5th Principal Meridian, said deed having been recorded in the office of the Register of Deeds of Becker County, Minnesota, in Book L of Miscellaneous Records, page 68; and that a certain Warranty Deed, executed by Bay-bah-mah-ge-wabe and Ah-goo-be-naunce, his wife, unto the Merchants Loan and Investment Company, under date of September 2nd, 1908, selling and conveying the East Half of the Southeast Quarter ($E\frac{1}{2}$ - $SE\frac{1}{4}$) of Section Nine (9), Township One hundred and forty two (142)

225 North, of Range Thirty eight (38) West of the 5th Principal Meridian, said deed having been recorded in the office of the Register of Deeds of Becker County, Minnesota, in Deed Book 33, page 341, are each and both null and void, and that all other conveyances and incumbrances predicated thereon are null and void, and that an accounting be taken of the timber cut and removed from said land by the said Nichols-Chisolm Lumber Company, do hereby appeal to the United States Circuit Court of Appeals for the Eighth Circuit, from said decree and order, and from the whole thereof, for the reasons set forth in said Defendants' Assignment of Errors, which is filed herewith, and the said defendants pray that this their Petition for said appeal may be allowed, and that a transcript of the record, proceedings, and papers upon which said decree and order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Eighth Circuit, sitting at St. Louis, Missouri.

R. J. POWELL,

Solicitor for Defendants, 654 Security
Bank Bldg., Minneapolis, Minn.

Dated, September 27th, 1912.

Order.

Upon consideration of the petition for appeal, it is

Ordered, that the claim of appeal therein made be and the same hereby is allowed.

It is Further Ordered, that a certified transcript of the record, testimony, exhibits, and all proceedings herein be transmitted to the United States Circuit Court of Appeals for the Eighth Circuit, within sixty days from the date hereof.

It is Further Ordered that this appeal act as supersedeas in said cause.

PAGE MORRIS, Judge.

Dated, September 27th, 1912.

Assignment of Errors.

And now, on this 27th day of September, A. D. 1912, comes the Nichols-Chisolm Lumber Company, Minneapolis Trust Company and Hiram R. Lyon, the defendants in the above entitled cause, by their Solicitor, R. J. Powell, and say that the decree and order entered in the above entitled cause on the 27th day of September, A. D. 1912, is erroneous and unjust to defendants, for the reasons now immediately hereinafter set forth, which are hereby assigned as error, and upon which said defendants will rely on their appeal from said decree and order to the United States Circuit Court of Appeals for the Eighth Circuit, to-wit:

I.

The court erred in finding and decreeing that a certain Warranty Timber Deed, executed by Bay-bah-mah-ge-wabe and Ah-ge-be-naunce, his wife, under date of October 27, 1907, in favor of the defendant Nichols-Chisolm Lumber Company, upon the East Half of the Southeast Quarter ($E\frac{1}{2}SE\frac{1}{4}$) of Section Nine (9), Township One hundred forty two (142) North, Range Thirty eight (38), West of the 5th Principal Meridian, the same being the timber upon the land described in the complaint herein, duly filed and recorded in the office of the Register of Deeds of Becker county, Minnesota, in Book L of Miscellaneous Records, at page 68, is null and void.

II.

The court erred in finding and decreeing that a certain Warranty Deed executed by Bay-bah-mah-ge-wabe and Ah-ge-be-naunce, his wife, under date of September 2, 1908, in favor of the [the] Merchants Loan and Investment Company, upon the East Half of the Southeast Quarter ($E\frac{1}{2}SE\frac{1}{4}$) of Section Nine (9), Township One hundred and forty two (142) North, Range Thirty eight (38), West of the 5th Principal Meridian, the same being the land described in the complaint herein, duly filed and recorded in the office of the Register of Deeds of Becker County, Minnesota, in Deed Book 33, page 341, is null and void.

III.

The court erred in finding and decreeing that all other conveyances and incumbrances predicated on the foregoing described and named conveyances are null and void and without force and effect.

IV.

The court erred in finding and deciding in said decree that Bay-bah-mah-ge-wabe had no right or authority to sell and

convey the said premises described in the Bill of Complaint herein to the said Merchants Loan and Investment Company.

V.

The court erred in finding and deciding in said decree that Bay-bah-mah-ge-wabe had no right or authority to sell and convey the timber on the said premises described in the Bill of Complaint herein to the defendant Nichols-Chisolm Lumber Company.

VI.

The court erred in finding and deciding in said decree that O-bay-bah-mah-ge-wabe was at the time of the execution by him of the Deeds described in the Bill of Complaint herein, a full-blood Indian of the Chippewas of the Mississippi, on the White Earth Reservation, State of Minnesota.

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VII.

The court erred in finding in said decree that Bay-bah-mah-ge-wabe held, at the time of the execution by him of the deeds described in the complaint herein, the land described in said deeds, to-wit: The East Half of the Southeast Quarter ($E\frac{1}{2}SE\frac{1}{4}$) of Section Nine (9), Township One hundred and forty two (142), North, of Range Thirty eight (38), West of the 5th Principal Meridian, in trust for the Government of the United States of America.

VIII.

The court erred in ordering that the decree herein made should be filed in the office of the Register of Deeds of Becker county, Minnesota.

IX.

The court erred in not making and rendering a decree in favor of the defendants and against the complainant, adjudging and decreeing that the land described in the complaint herein, to-wit: the East Half of the Southeast Quarter ($E\frac{1}{2}SE\frac{1}{4}$) of Section Nine (9), Township One hundred and forty two (142) North, of Range Thirty eight (38), West of the 5th Principal Meridian, was, at the time of the execution of the deeds referred to in the Bill of Complaint herein, the property of Bay-bah-mah-ge-wabe, and that he was the owner in fee simple of said land, with full and unrestricted power to mortgage, encumber, convey or otherwise dispose of the same.

X.

The court erred in not dismissing the Bill of Complaint herein for want of equity on the part of Complainant to maintain this action, in that it appeared from the evidence and

stipulated facts that said deeds and conveyances of the land and timber described in the complaint herein were fairly and freely made, in good faith, for a full and adequate consideration, which consideration had not been returned to defendants, nor any attempt or offer made by complainant to restore the same and place the parties to said transaction in statu quo.

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XI.

The court erred in not dismissing the Bill of Complaint herein for want of equity on the part of complainant, in that it appeared from the evidence and the stipulated facts that said complainant had not sufficient interest in the land described in said complaint to maintain this action in its own name and right.

XII.

The court erred in not finding and deciding that the land described in the complaint herein, and embraced in said deeds, was allotted in severalty to Bay-bah-mah-ge-wabe, pursuant to the Act of January 14th, 1889, 25 Stats. 642, commonly called the "Nelson Act," free from the restrictions of the Act of February 8th, 1887, 24 Stats. 388, commonly called the "General Allotment Act," upon the right to convey, sell, encumber or otherwise dispose of said property.

XIII.

The court erred in finding and decreeing that a warranty deed of the land described in the complaint herein, made and executed to the Merchants Loan and Investment Company under date of September 2, 1908, and duly filed for record in the office of the Register of Deeds of Becker County, Minnesota, in Deed Book 33, page 341, was null and void, for the reason that said Merchants Loan and Investment Company was not and is not a party to this action, and was not at the time said decree was made, and never had been before said court in this action, so that its rights might be herein determined.

XIV.

The court erred in not dismissing the Bill of Complaint herein for want of equity on the part of complainant to maintain this action in that, if the allegations of said complaint were taken as true, complainant had no cause of action, for the reason that a pretended conveyance of said land, or the timber thereon, made by defendants having no color of title thereto, could not constitute a cloud upon the title to
230 said land, nor give to the complainant any right to relief in equity.

Wherefore, said defendants prays that the decree and order of said District Court of the United States, District of Minnesota, Fifth Division, be in all things reversed, and such order and decree made by said Circuit Court of Appeals as ought according to equity to have been made in the premises in the first instance.

R. J. POWELL,
Solicitor for Defendants,
654 Security Bank Bldg.
Minneapolis, Minn.

Dated, September 27th, 1912.

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(Citation in Case 267.)

United States of America, To the United States of America, and Chas. C. Houpt, solicitor for complainant,—Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis Missouri, sixty days from and after the day this citation bears date, pursuant to an order allowing an appeal filed in the Clerk's Office of the United States District Court Fifth Division, wherein the Nichols-Chisolm Lumber Company, the Minneapolis Trust Company, and Hiram R. Lyon are defendants and appellants, and you are the complainant and appellee to show cause, if any there be, why the decree rendered against the said defendants and appellants as in said appeal mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Seal U. S. Dist. Court Fifth Division Dist. of Minnesota.	Witness, the Honorable Page Morris, Judge of said District Court this 27th day of September A. D. 1912.
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PAGE MORRIS,
Judge of the District Court.

Due Service of the foregoing Citation by Copy at Duluth Minnesota is hereby admitted this 27th day of September 1912.

CHAS. C. HOUP,
Solicitor for Complainant.

Filed in the District Court on Sept. 28, 1912.

232 (Proceedings in case of United States of America vs. Nichols-Chisolm Lumber Company, et al., No. 268.)

Praecipe for Transcript.

To the Clerk of Above Named Court:

Please make a return to the United States Circuit Court of Appeals for the Eighth Circuit upon an appeal of Complainant, and include therein the pleadings, stipulations, orders, report of Examiners containing Governments Exhibits "A" & "B" and Defendants Exhibit "1" decision of the Court decree, term minutes and all papers filed in this Court subsequent to September 3, 1912.

CHAS. C. HOUP,
Solicitor for Complainant.

R. J. POWELL,
Solicitor for Defendant.

233 (Bill of Complaint in Case No. 268.)

In the Circuit Court of the United States for the
District of Minnesota, Sixth Division, In Equity

To the Judges of the Circuit Court of the United States for the
District of Minnesota,—In Equity.

George W. Wickersham, Attorney General of the United States, for and on behalf of the United States of America, Complainant herein, brings this Bill of Complaint against Nichols Chisolm Lumber Company, a corporation, Minneapolis Trust Company, a corporation, and Hovey C. Clark, Defendants, and thereupon complaining says:

First.

That Defendants are citizens and residents of the District and State of Minnesota and that Nichols Chisolm Lumber Company and Minneapolis Trust Company are both corporations organized and existing under the laws of the State of Minnesota and having their respective principal places of business within said State.

234 **Second.**

That at all times heretofore since the acquisition of the territory comprised within said state and district by it, said Complainant has been and still is seized and possessed in fee simple of a certain parcel of land described as North half (N/2) of North East quarter (NE/4) of Section Twenty four (24) Township One Hundred Forty One (141) North, Range Thirty Nine (39) West of the Fifth Principal Meridian, of the value of Two Thousand Dollars (\$2000.) and upwards in the County of Becker.

within said District of Minnesota, as a part of its public domain, and has at all times heretofore exercised and still does exercise through the proper department of its Government sovereign power and authority over said lands and control of the management and disposition of the same.

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Third.

That during all the period hereinbefore in paragraph Second of this Bill mentioned, the Complainant has sought as a sovereign guardian to protect the interest of and assist certain Indians known as the Chippewa tribe or nation, and for such purpose during such period set apart as a reservation from its public domain and, for the time being, has devoted to the occupancy and use of what is known as the White Earth band of said nation or tribe certain townships of land, including the one hereinbefore described, within which the particular parcel of land, also hereinbefore described, is situated, and of which said parcel comprises a part; that later, through its Congress, Complainant provided for what is known as allotments in severalty of portions of land within said reservation to the respective Indians of said band, and particularly said described parcel; that without in any wise parting from its title in fee simple and its said ownership and control of said land, the Congress of Complainant enacted sundry statutes with provisions whereby respective parcels of land embraced within said reservation should be segregated from others set apart in severalty from the whole tract so reserved for the use and occupancy of the Indians respectively belonging to said band of said tribe and living upon said reservation to whom respectively such parcels respectively should be [allot-ed] in order to obviate the complexities and difficulties attendant upon a communal possession and occupancy of the whole of said reservation by said band; that in each and every instance, including that of the said parcel, such allotment in severalty did not amount at law or in equity to more than a license without consideration to the Complainant from the respective allottees for whose benefit such parcels were set aside with the right to go in and upon and occupy and enjoy for an indeterminate period without waste the respective parcels of land so set aside to each, including that hereinbefore described; that such rights were personal ones as to the said allottees as such licensees of Complainant, and were not attended by any incident, quality or character which would permit of their being assigned or transferred by such allottees by means of any manner of leases, grants, deeds or other conveyances to any other person or persons whomsoever because of such allotments being a matter of pure privilege by and through the grace of Complainant.

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Fourth.

Your Orator further shows that application was made to Complainant through its proper officers duly entrusted and charged with such affairs by Equay-zaince, an Indian of said tribe or band, for such an allotment embracing said described parcel of land; that the same was duly approved by said officers and that what is commonly known as a trust patent was on July-21-1902 executed to said Indian, by which the allotment of said described parcel of land to her became complete; and Complainant shows in connection with the proceedings last above mentioned, and particularly with said patent, that it merely promised therein, without consideration, to preserve said described parcel to said Indian named for a period of years in trust for [—] sole and only benefit and use, with the provision that thereafter, after twenty-five years from the execution of said trust patent, the same might be, at the discretion of the President of the United States, at some time conveyed to said Indian in fee simple.

Fifth

Your Orator further shows that by the courtesy and grace of Complainant, but without having given any consideration in law whatsoever therefor, said allottee had by such trust patent accorded to her a right to the personal use and occupancy of said allotted parcel of land as a home for herself during the period of twenty-five years, as hereinbefore stated, and might at the end of said period have been granted a patent in fee simple to said parcel, but did not have, either at law or in equity, any right, title or interest, claim or demand, upon, in, or to said parcel of land which she could assign, alienate, encumber or in any manner convey or have conveyed by any other person for her as legal representative in her name, place and stead, or in, by, under, or through the order of any court or person claiming to act as the officer of any court to any other person or persons whomsoever, against the right and title of Complainant hereinbefore in this Bill asserted, but your Orator shows that said Indian mistook her rights and privileges as allottee and grantee in said so-called trust patent and, assuming that said allotment and said trust patent were equal, or at least similar to the ownership and possession of a person having a title to land in fee simple, sought to encumber and convey said parcel of land, as will hereinafter more fully appear. And your Orator further shows that on February 15th 1907 the said Equay-zaince and No-di-nah-quah-um, her husband executed a so-called warranty deed covering the said described parcel of land and other lands to one Fred Sanders for an alleged consideration of One Dollar (\$1.00) which said so-called war-

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ranty deed was on February 15th 1907 filed in the office of the Register of Deeds of Becker County and thereafter duly recorded in Deeds Book 20 at page 493.

That on April 29th 1907 the said Fred Sanders executed a so-called warranty deed covering the said described parcel of land to one E. G. Holmes for an alleged consideration of Five Hundred Dollars (\$500.) which said so-called warranty deed was on May 11th 1907 filed in the office of the Register of Deeds of Becker County and thereafter duly recorded in Deeds Book 25 at page 181.

That on May 13th 1907 the said E. G. Holmes and Lucy Holmes his wife executed a so-called warranty deed covering the said described parcel of land and other lands not in this suit involved to the Merchants Loan and Investment Company for an alleged consideration of Seven Hundred Dollars (\$700.) which said so-called warranty deed was on May 15th 1907 filed in the office of the Register of Deeds of Becker County and thereafter duly recorded in Deeds Book 27 at page 5.

That on May 13th 1907 the said Merchants Loan and Investment Company executed a so-called warranty deed covering the said described parcel of land and other lands not in this suit involved to the Nichols Chisolm Lumber Company for an alleged consideration of Two Thousand Dollars (\$2000.) which said so-called warranty deed was on May 15th 1907 filed in the office of the Register of Deeds of Becker County and thereafter duly recorded in Deeds Book 15 at page 30.

238 And your Orator further shows that on June 19th 1909 the said Nichols Chisolm Lumber Company executed a so-called warranty deed covering the said described parcel of land and other lands not in this suit involved to one Hovey C. Clark for an alleged consideration of One Dollar (\$1.00) and other consideration, which said so-called warranty deed was on June 23rd. 1909 filed in the office of the Register of Deeds of Becker County and thereafter duly recorded in Deeds Book 29 at page 252.

That on July 2nd. 1909 the said Nichols Chisolm Lumber Company, and Hovey C. Clark and his wife, executed a so-called mortgage covering the said described parcel of land and other lands not in this suit involved to the Minneapolis Trust Company for an alleged consideration of One Dollar (\$1.00) which said so-called mortgage was on July 15th 1909 filed in the office of the Register of Deeds of Becker County and thereafter duly recorded in Mortgage Book 35 at page 342.

And your Orator further shows that the only encumbrance or conveyances existing of record against the said described parcels of land at the present time are the so-called warranty deed hereinbefore described as having been executed to the said Nichols Chisolm Lumber Company; the said so-called warranty deed hereinbefore described as having been executed to the said Hovey C. Clark, and the said so-called mortgage hereinbefore described as having been executed to the said Minneapolis Trust Company, other transactions relating to the said described parcel of land having been hereinbefore set forth and described for the purpose of fully placing of record in this suit the various transactions in which the said described parcel of land has erroneously and wrongfully become involved.

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Sixth.

And your Orator avers that neither by the allotment mentioned and herein described, nor by the so called trust patent, nor in any other manner, did the said allottee acquire from Complainant any vested right to said land assignable or transferable by her or by anybody else for her to any other person or persons, partnership, corporation or other party whomsoever or whatsoever, or any title whatever by which she or her legal representatives could divest or could deed, mortgage or otherwise convey or alien the same, and that any assumption or pretension of authority or power over said land by or on account of Complainant's said allotment or trust deed to said allottee by any person whomsoever save a properly constituted and authorized officer of this Complainant, was and is without authority of law or foundation in equity, and that every and all conveyances, liens, taxes, or other claims asserted [of] pretended as against said land, are wholly void and ineffectual and have at all times been so, and ought not to be recognized or tolerated by this Court, and that any mortgage, discharge of mortgage, deed, or paper connected therewith, respecting said parcel in any manner is an invasion of and interference with the sovereign rights of Complainant in the premises and constitutes a cloud upon the title of Complainant's property in said parcel of land and directly tends to deteriorate the same in value and impedes its full and unrestricted control and possession of and supervision over said land, and ought in equity and by the decree of the Judges of this Court to be removed and the title to Complainant be quieted.

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Seventh.

And your Orator further shows that said lands are not improved and occupied as in the case of ordinary farms, but

are in the main open and unoccupied, but that Complainant is in such occupancy as is presumed in law and in equity from absolute ownership and the right to use at all times in accordance with its sovereign pleasure and especially as against any pretended rights that can be asserted and maintained by said Defendants, and your Orator especially avers that the interests of Complainant as such owner, as well as guardian of the Indians of said White Earth of the Chippewa tribe, entitles it, Complainant, to the free, unrestricted and complete occupancy of said parcel, and the Defendants, or any party or parties whatsoever, claiming the right to such occupancy in, by, under, or through said Defendants, should by the Order and Decree of this Court be perpetually restrained from interfering with such Complainant's rights.

And your Orator avers that for the reasons recited in this Bill of Complaint, the so-called encumbrances and conveyances hereinbefore described as existing of record against the said described parcel of land, in so far as they affect the same, are wholly void and do not operate to convey at law or in equity any right, title or interest, in or to the said described parcel of land to the Defendants herein, and should therefore be set aside and held for naught by Order and Decree of this Honorable Court.

241 And your Orator further shows that he is informed and believes and therefore charges that the parcel of land hereinbefore described, and which mainly constitute the subject matter of this suit, was at the time of such allotment as hereinbefore described, was covered with pine and other variety of trees and timber of great value, but of what precise value your Orator is unable to state, which the said allottee was not authorized or in any manner entitled or empowered to waste by reason of such allotment; that the said Defendants in obtaining pretended conveyances of said land, pretended to have the right to cut and remove the same and have to a large extent done so, but to what precise extent your Orator is unable to say; but your Orator charges that Complainant is entitled to the full market value of such trees and timber or the lumber manufactured therefrom as having lost the same to the Defendants through such illegal and inequitable spoliation and waste and it therefore becomes and is the duty of the Defendant hereto and herein named to properly account for and pay over to the Complainant the value of all and singular such trees, timber or manufactured lumber under the proper Order and direction of this Honorable Court.

And your Orator shows that he justly fears that said defendants intend to further cut and remove such timber and despoil

the land of same and thereby cause greater loss and irreparable damage to Complainant by and through such acts and that Complainant is justly and equitably entitled to have defendants restrained from such unconscionable, illegal and inequitable conduct by Order of this Honorable Court whenever your Orator shall find it necessary or important to apply therefor, either during the pendency of this suit or at the time of final Decree herein; and have such relief without amendment to this Bill of Complaint or additional petition thereunto.

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Eighth.

Forasmuch, therefore, as Complainant is remediless in the premises at and by the strict rules of the Common law and is only relievable in a Court of Equity where matters of this kind are properly cognizable and relievable; and to the end that Complainant may have that relief to which it is entitled and that the defendants herein named may answer the premises, but not on oath or affirmation, such manner of answer being hereby expressly waived, your Orator prays:

That the said defendants be required to answer relative to the cutting and removing of the trees and timber so cut and removed from said land, and state what manner of disposition has been made of the same, and if any of said timber has been manufactured, the quantity of lumber manufactured therefrom, and if still in the form of logs and unmanufactured, state where same are located, and pay over to the Court for the benefit of Complainant herein the full value thereof, or restore same to the Complainant, as may seem most proper and just under the Order, direction and Decree of this Honorable Court:

And your Orator further prays that Complainant may have an injunction issued out of and under the seal of this Honorable Court commanding the said defendants, their attorneys, agents or employes to refrain and desist from further cutting, removing or otherwise disposing of the trees and timber which remain standing upon said land or logs remaining upon said land which may have been cut from said trees or timber, or lumber manufactured therefrom, and this under such reasonable and certain penalties and conditions as to this Honorable Court may seem most just and proper in the premises:

And your Orator further prays that the said so-called encumbrances and conveyances hereinbefore described as existing of record against the said described parcel of land, in so

far as they affect the same, be set aside and held for naught as being clouds upon the title of Complainant thereto; that the title of Complainant thereto be quieted and settled and that Complainant be left in the peaceable and undisturbed possession thereof by Order and Decree of this Honorable Court.

243 And that Complainant may have from this Honorable Court such other and further relief in the premises as the circumstances may seem to require and as shall be found agreeable to equity and good conscience.

May it please your Honors to grant unto the Complainant the right of subpoena to be issued out of and under the seal of this Honorable Court directed to said Defendants Nichols Chisolm Lumber Company, Minneapolis Trust Company, and Hovey C. Clark, commanding them to appear in this Court on a day certain therein to be named and then and there stand to and abide by such order, Judgment and Decree herein as to your Honors shall seem meet and proper; and your Orator will ever pray.

GEORGE W. WICKERSHAM,
Attorney General of the United States.

CHARLES C. HOUP,
United States Attorney for the District
of Minnesota, and Solicitor for Com-
plainant.

Marsden C. Burch
Eugene H. Long
Arthur M. Seekell
Wm. A. Norton
of Counsel.

244 (Answer of Nichols-Chisolm Lumber Co. and Hovey C. Clark.)

The Answer of Nichols-Chisolm Lumber Company and Hovey C. Clark, two of the defendants above named, to the Bill of Complaint of George W. Wickersham, Attorney General of the United States, for and in behalf of the United States of America, Complainant.

These defendants now and at all times hereafter saving and reserving to themselves all and all manner of benefit and advantage of exception, or otherwise, that can or may be had or taken to the many errors, uncertainties and other imperfections in the said Bill contained, for Answer thereto, or to so much and such parts thereof as these defendants are advised it is material or necessary for them to make answer unto, answering, say:

1st: These defendants deny all of the allegations set forth in the second paragraph in said Bill, and on the contrary these defendants allege that the Complainant herein has not been in possession of the lands described in said second paragraph of said Bill in any manner, nor has the said Complainant been seized or possessed of said parcel of land in fee simple, or otherwise, for more than thirty years last past; and the said parcel of land is not now, and for more than thirty years last past has not been any part of the public domain.

2nd: These defendants deny each and every allegation, matter and thing in the third paragraph of said Bill of
245 Complaint contained, as the same is therein set forth, and on the contrary these defendants allege that the territory comprised within what is known as the White Earth Reservation, in the state of Minnesota, was originally a portion of the territory over which the Indians of the Chippewa Nation exercised dominion, and that it continued to be a part of the Indian country and exclusively under the dominion, use and occupancy of the Chippewa Nation of Indians until it was ceded to the United States of America by certain Treaties entered into between the Government of the said United States and said Chippewa Indians in the year 1865, and prior years. By the said several Treaties entered into between the Chippewa Indians and the United States of America, there were reserved for the Mississippi Bands of said Chippewa Indians, certain lands and territory situated in the state and district of Minnesota, which lands were, by said Treaties, fully and completely confirmed and established as the property of said Indians. That thereafter and on March 19th, 1867, a Treaty was entered into between the Complainant herein and the Mississippi Bands of Chippewa Indians, wherein and whereby the said Complainant, United States of America, in consideration of the relinquishment and transfer to the said Complainant of the Reservations theretofore set apart and conveyed to said Indians, did then and there convey, transfer and set over unto said Bands of Indians all of the territory comprised within the limits of the White Earth Reservation, and did thereafter duly proclaim and confirm the said Treaty. Pursuant thereto the Indians of the Mississippi Bands of Chippewas entered upon and took up their residence within the boundaries of said White Earth Reservation, and ever since said time the White Earth Reservation has been occupied, used and enjoyed by the said Mississippi Bands of Chippewas as their homes and the said Indians have ever since said period, and are now in the exclusive use and enjoyment thereof. These defendants admit

that the United States of America has passed Sundry
246 laws relating to the government of Indian tribes and affairs, and has thereby provided for the taking of allotments in severalty by individual Indians upon said several Reservations, and particularly to the taking of allotments by Indians residing upon the White Earth Reservation, and has from time to time provided methods whereby Indians might sever their tribal relations and take a portion of the tribal property in severalty, and these defendants admit that in accordance with such laws and regulations, many of the Indians belonging to the Mississippi Bands of Chippewas in the state of Minnesota, and residing upon the White Earth Reservation, have selected portions of their lands as allotments in severalty, and have to that extent complied with and recognized said several acts, laws and regulations of Congress relating thereto, but these defendants deny that the granting of such allotments by the Complainant has been an act of grace, or that the Indians so selecting the same have obtained such allotments, without consideration, and on the contrary allege that the property so selected by the Indians in severalty was at all times since the adoption of the Treaty of 1867, hereinbefore referred to, the sole property of said several bands of Indians jointly, of which the Indians selecting such allotments were members, and that upon the selection of such allotments the Indians in each and every case acquired a full and complete title in fee simple, any and all provisions in the acts and regulations of Congress to the contrary notwithstanding.

3rd: These defendants admit that the lands described in the Bill of Complaint herein were selected by Equay-zaince as in the Bill of Complaint set forth, and that the same was approved and a trust patent issued as therein alleged, but these defendants deny that said trust patent was without consideration, or that the same was of any greater or other force and effect than a recognition of said selection in severalty by said Indian, of property which she previously owned in common as a member of said band.

247 4th: Further answering, these defendants, at all times denying the title or interest of the Complainant in said premises, and denying that the allottee of said parcel of land acquired the same merely by the grace and courtesy of Complainant, and had no other or greater interest therein than a mere license to use the same, admit that the instruments described in the fifth paragraph of the Bill of Complaint were executed and recorded.

5th: These defendants deny that the conveyances by said Equay-zaince, and said several conveyances described in the

Bill, are void, or of no effect, or that the same are in any manner an invasion of, or interference with the sovereign rights of the Complainant in the premises, or that the same, or any of them, constitute a cloud upon the title of Complainant's property in said parcel of land, and deny that the Complainant has any right whatever to the control or possession thereof, or supervision over the same. These defendants deny that the lands described in said Bill of Complaint are in the main vacant and unoccupied.

6th: Further answering, these defendants allege and aver that the said Equay-zaince mentioned in the Bill of Complaint herein, and who selected as her allotment in severalty the premises therein described, is a mixed-blood Chippewa Indian, and not an Indian of the full-blood, and that she is one of the class of Indians referred to in the act of Congress relating to the Chippewa Indians on the White Earth Reservation, in the state of Minnesota, approved June 21, 1906, and the further act of Congress relating thereto, approved March 1, 1907, and that by virtue of said acts of Congress said allottee, described and referred to in the Bill of Complaint, is and was wholly emancipated and removed from the pretended control or supervision of the Complainant, United States of America, and was thereby fully authorized and empowered to manage her
248 own affairs and control and dispose of her own property, including the allotment in question, to the same extent and with the same force and effect as though she had been a full citizen of the United States and State of Minnesota, and a person wholly of the white blood. These defendants further allege in that behalf that the premises in controversy were conveyed by the allottee hereinbefore mentioned to the said Fred Sanders, mentioned in the Bill of Complaint, for a full and fair consideration, as these defendants are informed and verily believe, and that at the time of the execution of said conveyance by said allottee and her husband, the said allottee made oath to the fact that she was a mixed-blood Chippewa Indian, and of the class mentioned in said several acts of Congress, which said affidavit or oath of the allottee was attached to her said conveyance, and became a part of the record thereof, and these defendants, in purchasing the property, were advised of that fact, and had no knowledge or information to the contrary, nor means of readily ascertaining the true facts with relation thereto, and did in all things fully rely upon the affidavit and representations made by said allottee at the time of the execution of her said conveyance, and did purchase the said property in good faith, fully believing that the said allottee had full right and authority under said several acts of Con-

gress to convey the said property, and did pay therefor the full and fair value of said premises. That the allottee has not returned the consideration received for her said conveyance, nor offered to return the same, or to place the parties in any manner in statu quo, nor has the Complainant in its assumed role of pretended Guardian of said Indian, or Indians, offered or attempted in any manner to refund the payment so made to the allottee, pursuant to her said representations, or to in any manner secure such refundment, or protect these defendants, or any of their grantors, claiming [thru] said allottee, from loss, by reason of the acts complained of.

249 7th: Further answering, these defendants at this time deny the right of the Complainant to require these defendants to account in any manner for timber now upon the said premises, or which may have been thereon at the time of the purchase thereof from said Merchants Loan and Investment Company, mentioned in the Bill of Complaint, and allege that by reason of the facts hereinbefore set forth, the existence of timber upon said premises is wholly immaterial. But, if the court shall hereafter decide that the conveyances under which these defendants claim title to the said premises are invalid, and that these defendants have no rights or equities therein, then and in that case, these defendants will be prepared and willing to account for any timber which may have been cut or removed from said premises, and for which they are in any manner responsible, at such time and in such manner as the court may direct.

250 Wherefore, These defendants, having fully answered, confessed, traversed and avoided or denied all of the matters in the said Bill of Complaint material to be answered, according to their best knowledge and belief, humbly pray this honorable court to enter its judgment that these defendants be hence dismissed, with their reasonable costs and charges in this behalf most wrongfully sustained, and for such other and further relief in the premises as to this honorable court may seem meet and in accordance with equity.

R. J. POWELL,

Solicitor for said Defendants, 312-14 Lumber Exchange Bldg., Minneapolis, Minn.

Filed in the Circuit Court on Sept. 4, 1911.

251

(Answer of Minneapolis Trust Co.)

The Answer of Minneapolis Trust Company, one of the defendants above named, to the Bill of Complaint of George W. Wickersham, Attorney General of the United States, for and in behalf of the United States of America, Complainant.

This defendant, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception, or otherwise, that can or may be had or taken to the many errors, uncertainties and other imperfections in the said Bill contained, for Answer thereto, or to so much and such parts thereof as this defendant is advised it is material or necessary for it to make answer unto, answering, says:

1st: This defendant denies all of the allegations set forth in the second paragraph in said Bill, and on the contrary this defendant alleges that the Complainant herein has not been in possession of the lands described in said second paragraph of said Bill in any manner, nor has the said Complainant been seized or possessed of said parcel of land in fee simple, or otherwise, for more than thirty years last past; and the said parcel of land is not now, and for more than thirty years last past has not been any part of the public domain.

2nd: This defendant denies each and every allegation, matter and thing in the third paragraph of said Bill of
252 Complaint contained, as the same is therein set forth, and on the contrary this defendant alleges that the territory comprised within what is known as the White Earth Reservation, in the state of Minnesota, was originally a portion of the territory over which the Indians of the Chippewa Nation exercised dominion, and that it continued to be a part of the Indian country and exclusively under the dominion, use and occupancy of the Chippewa Nation of Indians until it was ceded to the United States of America by certain Treaties entered into between the Government of the said United States and said Chippewa Indians in the year 1865, and prior years. By the said several Treaties entered into between the Chippewa Indians and the United States of America, there were reserved for the Mississippi Bands of said Chippewa Indians, certain lands and territory situated in the state and district of Minnesota, which lands were, by said Treaties, fully and completely confirmed and established as the property of said Indians. That thereafter and on March 19th, 1867, a Treaty was entered into between the Complainant herein and the Mississippi Bands of Chippewa Indians, wherein and whereby the said Complainant, United States of America, in consideration of the relinquishment and transfer to the said Complainant of the Reservations theretofore set apart and conveyed to said Indians, did then and there convey, transfer and set over unto said Bands of Indians all of the territory comprised within the limits of the White Earth Reservation, and did thereafter duly proclaim and confirm the said Treaty. Pursuant thereto the Indians of the Mississippi Bands of Chippewas entered upon and took up

their residence within the boundaries of said White Earth Reservation, and ever since said time the White Earth Reservation has been occupied, used and enjoyed by the said Mississippi Bands of Chippewas as their homes, and the said Indians have ever since said period, and are now in the exclusive use and enjoyment thereof. This defendant admits that the United

253 States of America has passed Sundry laws relating to the government of Indian tribes and affairs, and has thereby provided for the taking of allotments in severalty by individual Indians upon said several Reservations, and particularly to the taking of allotments by Indians residing upon the White Earth Reservation, and has from time to time provided methods whereby Indians might sever their tribal relations and take a portion of the tribal property in severalty, and this defendant admits that in accordance with such laws and regulations, many of the Indians belonging to the Mississippi Bands of Chippewas in the state of Minnesota, and residing upon the White Earth Reservation, have selected portions of their lands as allotments in severalty, and have to that extent complied with and recognized said several acts, laws and regulations of Congress relating thereto, but this defendant denies that the granting of such allotments by the Complainant has been an act of grace, or that the Indians so selecting the same have obtained such allotments, without consideration, and on the contrary alleges that the property so selected by the Indians in severalty was at all times since the adoption of the Treaty of 1867, hereinbefore referred to, the sole property of said several bands of Indians jointly, of which the Indians selecting such allotments were members, and that upon the selection of such allotments the Indians in each and every case acquired a full and complete title in fee simple, any and all provisions in the acts and regulations of Congress to the contrary notwithstanding.

3rd: This defendant admits that the lands described in the Bill of Complaint herein were selected by Equay-zaince, as in the Bill of Complaint set forth, and that the same was approved and a trust patent issued as therein alleged, but this defendant denies that said trust patent was without consideration, or that the same was of any greater or other force and effect than a recognition of said selection in severalty by said Indian, of property which she previously owned in common as a member of said band.

254 4th: Further answering, this defendant, at all times denying the title or interest of the Complainant in said premises, and denying that the allottee of said parcel of land acquired the same merely by the grace and courtesy of Com-

plainant, and had no other or greater interest therein than a mere license to use the same, admits that the instruments described in the fifth paragraph of the Bill of Complaint were executed and recorded.

5th: This defendant denies that the conveyance by said Equay-zaince....., and said several conveyances described in the Bill, are void, or of no effect, or that the same are in any manner an invasion of, or interference with the sovereign rights of the Complainant in the premises, or that the same, or any of them, constitute a cloud upon the title of Complainant's property in said parcel of land, and denies that the Complainant has any right whatever to the control or possession thereof, or supervision over the same. This defendant denies that the lands described in said Bill of Complaint are in the main vacant and unoccupied.

6th: Further answering, this defendant alleges and avers that the said Equay-zaince..... mentioned in the Bill of Complaint herein, and who selected as her allotment in severalty the premises therein described, is a mixed-blood Chippewa Indian, and not an Indian of the full-blood, and that she is one of the class of Indians referred to in the act of Congress relating to the Chippewa Indians on the White Earth Reservation, in the state of Minnesota, approved June 21, 1906, and the further act of Congress relating thereto, approved March 1, 1907, and that by virtue of said acts of Congress said allottee, described and referred to in the Bill of Complaint, is and was wholly emancipated and removed from the pretended control or supervision of the Complainant, United States
 255 of America, and was thereby fully authorized and empowered to manage her own affairs and control and dispose of her own property, including the allotment in question, to the same extent and with the same force and effect as though she had been a full citizen of the United States and state of Minnesota, and a person wholly of the white blood. This defendant further alleges in that behalf that it is informed and verily believes that the premises in controversy were conveyed by said allottee and her husband to Fred Sanders, mentioned in the Bill of Complaint, for a full and fair consideration, and this defendant, at the time of the execution of its mortgage or deed of trust, referred to and described in the Bill of Complaint, which said deed of trust covered the land in controversy, and other land, paid to the defendant Nichols-Chisolm Lumber Company, or in its behalf, a valuable consideration. That at the time of the said transaction it was made to appear to this defendant that said allottee had made oath to the fact that she was a mixed-blood Chippewa Indian, residing upon the

White Earth Reservation, and of the class mentioned in said several acts of Congress, and this defendant had no knowledge or information to the contrary, nor means of readily ascertaining the true facts with relation thereto, and did in all things fully rely upon the affidavit and representations made by said allottee at the time of the execution of her said conveyance, as aforesaid, and did accept the said deed of trust in good faith, fully believing that said allottee had full right and authority under said several acts of Congress to convey said property.

256 Wherefore, this defendant having fully answered, confessed, traversed and avoided or denied all of the matters in the said Bill of Complaint material to be answered, according to its best knowledge and belief, humbly prays this honorable court to enter its judgment that this defendant be hence dismissed, with its reasonable costs and charges in this behalf most wrongfully sustained, and for such other and further relief in the premises as to this honorable court may seem meet and in accordance with equity.

R. J. POWELL,

Solicitor for said Defendant, 312-14 Lumber
Exchange Bldg., Minneapolis, Minn.

Filed in the Circuit Court on Sept. 4, 1911.

257 (Replication to Answer of Minneapolis Trust Co.)

This Replicant, saving and reserving to itself all and all manner of advantage of exception, which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the Answer of the Defendants, Minneapolis Trust Company, for replication thereto, saith, that it doth and will aver, maintain, and prove its said Bill to be true, certain and sufficient in the law to be answered unto by the said named Defendants, and that the Answer of the said Defendants is very uncertain, evasive, and insufficient in law, to be replied unto by this Replicant; without this, that any other matter or thing in the said Answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all of which matters and things this Replicant is ready to aver, maintain, and prove as this Honorable Court shall direct, and humbly prays as in and by its said Bill, it hath already prayed.

CHARLES C. HOUP,

United States Attorney for the District
of Minnesota, and Solicitor for Com-
plainant.

Marsden C. Burch,
Of Counsel.

Filed in the Circuit Court on Oct. 2, 1911.

258 (Replication to Answer of Nichols-Chisolm Lumber Co.
and Hovey C. Clark.)

This Replicant, saving and reserving to itself all and all manner of advantage of exception, which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the Answer of the Defendants, Nichols Chisolm Lumber Company and Hovey C. Clark, for replication thereto, saith, that it doth and will aver, maintain, and prove its said Bill to be true, certain, and sufficient in the law to be answered unto by the said named Defendants, and that the Answer of the said Defendants is very uncertain, evasive, and insufficient in law, to be replied unto by this Replicant; without this, that any other matter or thing in the said Answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all of which matters and things this Replicant is ready to aver, maintain, and prove as this Honorable Court shall direct, and humbly prays as in and by its said Bill, it hath already prayed.

CHARLES C. HOUPt,

United States Attorney for the District
of Minnesota, and Solicitor for Com-
plainant.

Marsden C. Burch,
Of Counsel.

Filed in the Circuit Court on Oct. 2, 1911.

259 (Stipulation for appointment of Examiner and
taking of Testimony, etc.)

And now comes the said Complainant by Charles C. Houpt, United States Attorney for said District, and Solicitor herein, and the undersigned of counsel for Complainant, and R. J. Powell, Solicitor for said Defendant, and of counsel, and hereby stipulate and agree for and in behalf of the said parties respectively,—

First: That the evidence in this suit shall be taken orally and without giving the usual formal notice to that effect provided for in Equity Rule No. 67.

Second: That by authority and with the consent of the Court, or Judge at chambers, such testimony shall be taken be-

fore an examiner to be specially appointed by said Court, or Judge at Chambers, said examiner to be a skillful stenographer, and the testimony so taken stenographically shall be by such examiner put into typewriting.

The testimony of each witness after such reduction to writing shall be deemed and treated as the official testimony and evidence in the case without being signed by the respective witnesses or the examiner in their stead.

Third: Any written stipulation between solicitors or counsel of the respective parties as to any matter or thing being deemed as true or to be considered by the Court as evidence in the cause may be filed with such examiner and returned by him as evidence in the cause, to be treated and considered by the Court the same as though taken by such examiner in the
260 regular way; and no charge shall be made for such filing and return of such written stipulation, except for noting the same in the record and for such copies as may be requested by either party.

Fourth: That the Order of the Court, or Judge at Chambers, appointing such special examiner shall only empower such examiner to take such testimony, depositions, etc., and extend such portions thereof that are not in writing, and report the whole thereof to the Court to be used upon the trial of the Cause.

Fifth: The evidence so taken shall, unless the time shall be extended by agreement between the solicitors and counsel for the respective parties, or by Order of the Court, be as follows:

The Complainant's evidence, in chief, shall be adduced and completed within sixty days from the date of the Order of this Court, to be based upon this stipulation; the evidence for the Defendant shall be adduced and completed within ninety days from the expiration of the aforesaid sixty days, or the conclusion of Complainant's proofs; the evidence, if any, offered by Complainant in rebuttal shall be adduced and completed within ninety days from the expiration of the time above allotted to the Defendant, or the conclusion of the proofs of Defendant.

Sixth: When the evidence is so taken and reduced to typewriting, either party may procure a copy, or copies, of all such evidence, or such portions thereof as may be desired, upon such terms as may be agreed upon with the examiner; and publication of the testimony may pass into the Clerk's of-

file upon the mere filing of the examiner's return, without formal notice or order.

CHARLES C. HOUPPT,
Solicitor for Complainant.

M. C. BURCH,
Of Counsel for Complainant.

R. J. POWELL,
Solicitor for Defendant.

Filed in the Circuit Court on Oct. 31, 1911.

261 (Order Appointing Special Examiner, Etc.)

On reading and filing the annexed stipulation, and it appearing by the files and records that this cause is at issue, and on motion of Charles C. Houpt, Solicitor for Complainant, and R. J. Powell, solicitor for Defendant, that the Court appoint some qualified person within said district to act as examiner of this Court to take orally such depositions, evidence and testimony as the parties hereto desire to be taken, in accordance with the rules of practice and the terms of said stipulation, at such suitable place or places within said district as may be designated by the solicitors or counsel of the respective parties from time to time,

It is therefore ordered that such testimony shall be taken before an examiner, to be hereinafter named, and the testimony so taken stenographically by him shall be put into type-writing; that the testimony of each witness after such reduction to writing shall be deemed and treated as the official testimony and evidence in the case without being signed by the respective witnesses, or the examiner in their stead; that any written stipulation between solicitors or counsel of the respective parties as to any matter or thing being deemed as true, or to be considered by the Court as evidence in the cause, may be filed with such examiner and returned by him as evidence in the cause, to be treated and considered by the Court the same as though taken by such examiner in the regular way, and no charge shall be made by such examiner for such filing and return of such written stipulation, except for noting the same in the record, and for such copies as may be requested by either party; that such examiner shall, after taking such testimony, depositions, etc., extend such portions thereof as are not in writing, and then report the whole

262 thereof to the Court to be used upon the trial of the cause; that the evidence so taken shall, unless the time shall be extended by agreement between the solicitors or coun-

sel for the respective parties, or by Order of Court, be as follows:

Complainant's evidence, in chief, shall be adduced and completed within sixty days from the date of this Order; that the evidence for the Defendant shall be adduced and completed within ninety days from and after the expiration of the aforesaid sixty days, or the conclusion of the proofs of Complainant; that the evidence, if any, offered by Complainant in rebuttal, shall be adduced and completed within ninety days from the expiration of the time above allotted to the Defendant, or the conclusion of the proofs of Defendant.

When the evidence is so taken and reduced to typewriting, either party may procure a copy, or copies, of all, or such portions thereof as may be desired, upon such terms as may be agreed upon with the Examiner, and no formal publication of the testimony is necessary; and

It is further ordered that Mr. J. J. Cameron, of Bemidji, Minnesota, be, and he is hereby appointed a Special Examiner of this Court, with power and authority to take and transmit to this Court such evidence, depositions and testimony in this cause as the parties hereto desire to be taken, at such places within this district and at such times as may suit the convenience of said Examiner and the parties hereto, conforming, however, as nearly as practicable, to the times hereinbefore named for such taking; and that said Examiner extend such portions thereof as are not in writing, and then report the whole thereof, with all convenient speed, to this Court, said testimony, when so taken, to be used upon the trial of this cause.

PAGE MORRIS, Judge.

Dated this 15th day of April, 1912.

(Copy)

Filed in the District Court on April 6, 1912.

263

(Report of Special Examiner.)

The above entitled cause was regularly brought on for the taking of testimony, before J. J. Cameron, Esquire, Special Examiner, pursuant to the order of the Court heretofore made herein, on the 24th day of June, A. D., 1912, at 512 Federal Building, Minneapolis, Minnesota; Charles C. Houpt, Esquire, United States District Attorney, and Messrs. W. A. Norton and Gordon Cain, appeared on behalf of the Government, and R. J. Powell, Esquire, of Minneapolis, Minnesota, appeared on behalf of the defendants.

Whereupon, the Government offered in evidence Government's Exhibit "A", which was received in evidence without objection, except as to materiality, competency and so forth, but not as to the manner of establishing the Government's case.

Whereupon, the Government offered in evidence Government's Exhibit "B", which was received in evidence without objection, it being conceded that it is a true copy of the Trust Patent named in the Bill of Complaint as having been issued to the allottee therein named.

Whereupon, the Government rested its case.

264

(Stipulation as to Certain Facts.)

It is hereby stipulated and agreed by and between the respective parties to the above entitled cause, through their respective solicitors and counsel, that the following facts are deemed to be true for the purposes of the trial and decision of this cause:

First: That nothing in this stipulation shall bar the defendant from proving that the allottee is a mixed-blood Indian according to the issue raised under the pleadings, nor waive the right of the defendant to claim that the burden is on the Government to prove that the allottee is a full-blood Indian in making its case in chief:

Second: That at the time this stipulation is offered for filing as an exhibit before the examiner, counsel for defendant may raise such objections thereto as they may deem proper as to its materiality, competency, etc., but not as to such method of proving the facts therein set forth:

Third: That the land involved in this cause and described in the bill of complaint is situated within, and comprises a part of what is denominated and known as the White Earth Reservation in Minnesota.

Fourth: That Equay-zaince referred to in the bill of complaint as the allottee, an Indian, then belonging to, and a member of one of the bands of Chippewa Indians residing on the White Earth Reservation, exercising rights and privileges as such member, drawing annuities, etc., selected in allotment the land described in the bill of complaint; that such selection was duly approved by the proper officers of the Government and afterwards, to-wit, on July-21-1902, what is commonly known as a trust patent was duly issued to said Indian, in accordance with (it is claimed) the provisions of

Section 5 of the Act of Congress approved February 8, 1887 (24 Stats. L., 388):

265 That on Feby. 15, 1907 the said Equay-zaince and No-di-nah-quah-um, her husband, executed a so-called Warranty Deed pretending thereby to convey the parcel of land described in the Bill of Complaint herein unto one Fred Sanders for an alleged consideration of One Dollar (\$1.00) which said so-called Warranty Deed is recorded in the Office of the Register of Deeds of Becker County in Deeds book 20 at page 493.

That on April 29, 1907 the said Fred Sanders executed a so-called Warranty Deed pretending thereby to convey the parcel of land described in the Bill of Complaint herein unto one E. G. Holmes for an alleged consideration of Five Hundred Dollars (\$500.00) which said so-called Warranty Deed was recorded in the Office of the Register of Deeds of Becker County in Deeds book 25 at page 181.

That on May 13, 1907 the said E. G. Holmes and Lucy Holmes, his wife, executed a so-called Warranty Deed pretending thereby to convey the parcel of land described in the Bill of Complaint herein and other lands not in this suit involved unto the Merchants Loan & Investment Company for an alleged consideration of Seven hundred Dollars (\$700.00) which said so-called Warranty Deed was recorded in the Office of the Register of Deeds of Becker County in Deeds book 27 at page 5.

That on May 13, 1907, the said Merchants Loan & Investment Company executed a so-called Warranty Deed pretending thereby to convey the parcel of land described in the Bill of Complaint herein and other lands not in this suit involved, unto the Nichols-Chisolm Lumber Company for an alleged consideration of Two thousand Dollars (\$2000.00) and which said so-called Warranty Deed was recorded in the office of the Register of Deeds of Becker County in Deeds book 15 at page 30.

That on June 19, 1909 the said Nichols-Chisolm Lumber Company executed a so-called Warranty Deed pretending thereby to convey the parcel of land described in the Bill of Complaint herein and other lands not in this suit involved, unto one Hovey C. Clarke for an alleged consideration of One Dollar (\$1.00) and other consideration which said so-called Warranty Deed was filed in the Office of the Register of Deeds of Becker County on June 23, 1909.

266 That on July 2, 1909 the said Nichols-Chisolm Lumber Company, joined by Hovey C. Clarke and wife, Thomas

H. Shevlin and his wife, executed a so-called Mortgage covering the parcel of land described in the Bill of Complaint herein, and other lands not in this suit involved, unto the Minneapolis Trust Company for an alleged consideration of One million, five hundred thousand Dollars (\$1,500,000.00) which said so-called Mortgage was recorded in the Office of the Register of Deeds of Becker County in Mortgage book 35 at page 342.

That on Aug. 12, 1909 there was filed in the Office of the Register of Deeds of Becker County, a Notice of Lis Pendens giving notice therein of the Commencement of an Action in the proper Court of said District for the purpose of setting aside the various Deeds of conveyance hereinbefore described, relating to the parcel of land, described in the Bill of Complaint herein, and in which said Notice of Lis Pendens it appeared that the said Equay-zaince and No-dinah-quah-um were plaintiffs and Fred Sanders and one A. F. Anundsen were defendants, and which said Notice of Lis Pendens was recorded in the Office of the Register of Deeds of Becker County in Mortgage book 35 at page 465.

That no subsequent or other or further transfers, encumbrances or conveyances appeared to be of record against the parcel of land described in the Bill of Complaint herein, at the time of the filing thereof, at which time a Notice of Lis Pendens was duly filed against the parcel of land in the Office of the Register of Deeds of Becker County, Minnesota.

CHARLES C. HOUPPT,
Solicitor for Complainant.

M. C. BURCH,
Of Counsel for Complainant.

R. J. POWELL,
Solicitor for Defendant.

.....
Of Counsel for Defendant.

267 (Government's Exhibit B, Trust Patent Issued to
Equay-zaince.)

The United States of America,

To all to whom these Presents shall come—Greeting:

Whereas, There has been deposited in the General Land Office of the United States a schedule of allotments approved by the Secretary of the Interior February 28, 1901, whereby

it appears that Equay-zaince an Indian of the Chippewa tribe or band has been allotted the following-described land, North-half ($N\frac{1}{2}$) of the Northeast quarter ($NE\frac{1}{4}$) of section twenty-four (24) in township one hundred and forty-one (141) north of Range Thirty-nine West of the fifth Principal Meridian in Minnesota containing eighty (80) acres.

Now Know Ye, that the United States of America, in consideration of the premises, has allotted, and by these presents does allot, unto the said Equay-zaince the land above described and hereby declares that it does and will hold the land thus allotted (subject to all statutory provisions and restrictions) for the period of twenty-five years, in trust for the sole use and benefit of the said Equay-zaince or in the case of her decease, for the sole use of her heirs, according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or her heirs, as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever:

Provided, That the President of the United States may, in his discretion, extend the said period.

In Testimony Whereof, I, Theo. Roosevelt, President of the United States of America, have caused these Letters to be made Patent and the Seal of the General Land Office to be hereunto affixed.

Given under my hand at the City of Washington, this twenty-first (21) day of July, in the year of our Lord one thousand nine hundred and two, and of the Independence of the United States the one hundred and twenty-seventh.

By the President:

THEO. ROOSEVELT,

By F. M. Mc Keen Secretary.

Recorded

Vol.

C. H. BRUSH

Recorder of the Land Office.

268

For the Defense.

Whereupon, Defendant's Exhibit "1" was offered and received in evidence without objection.

Whereupon, the Defendants rested their case.

269

Defendant's Exhibit 1.

(Stipulation as to certain Facts.)

Come now the parties to the above entitled action, by their respective Solicitors and Counsel, and for the purpose of this case only, stipulate and agree that the facts hereinafter stated shall be deemed established and sustained by proper evidence, subject however to the objections and exceptions hereinafter noted; provided however, and it is expressly so agreed that the facts herein are agreed upon for the purpose of this case only, and that the determination and agreement upon the facts in this case shall not be held or permitted to determine or influence the determination of questions of fact in any other similar case or cases between the United States and the same or other parties, and to that end the facts deemed to be established herein are as follows:

1: That the allottee named in the Bill of Complaint, and to whom the premises in controversy were assigned by an instrument known and described as a Trust Patent, was at the time of the conveyance mentioned in the Bill of Complaint, and adult Chippewa Indian, residing upon the White Earth Reservation. That said allottee, it is agreed, had and has one eighth of white blood, no more and no less.

2: That the consideration for the conveyance executed by the said allottee, and described in the Bill of Complaint, and through which the defendants herein claim title, was the full and fair value of the property at the time of such conveyance, it being stipulated that this fact is agreed upon subject to the objection on the part of the plaintiff that it is irrelevant and immaterial.

3: That at the time of the execution of the said conveyance, the allottee represented and made oath to the fact that she was an adult mixed-blood Chippewa Indian, and the defendants paid the consideration and accepted their conveyances in reliance upon the said oath and representations of the allottee, without knowledge or information as to the truth or falsity of such representations, and without means of ascertaining the true facts with relation thereto, all of the foregoing facts being agreed upon at this time subject to the objection on the part of the plaintiff that each and every one of said facts are immaterial and irrelevant to the issues in said cause.

4. That the allottee has not returned the consideration received for her said conveyance, nor offered to return the same, nor to place the parties in any manner in statu quo, nor has the Complainant offered or attempted in any manner to refund

or secure the refundment of the payment so made to the allottee, or protect these defendants in any manner, all of which facts are agreed upon subject to the objection on the part of the plaintiff that each and every one of said facts are irrelevant and immaterial in this case.

5: It is Further Stipulated and Agreed by and between the parties hereto, through their respective solicitors and counsel, that under the Treaty of September 30, 1854, between the United States and the Chippewa Indians of Lake Superior and the Mississippi, commonly known and referred to as the 271 "LaPointe Treaty," a provision was made for mixed-bloods among the Chippewa Indians, and that in the administration of Indian Affairs under said Treaty a question as to the construction of the term "mixed-bloods" arose and was referred by the Indian Agent at Detroit, Michigan, to the Commissioner of Indian Affairs for an opinion. That thereupon and in response to such request, the Commissioner of Indian Affairs rendered an opinion in the form of the following letter:

"Department of the Interior, Office of Indian Affairs,
June 15, 1855.

Sir: I have to acknowledge the receipt of your letter of the 9th instant, relating to reservations of land for the Chippewa Indians, under the treaty of September last, and making certain inquiries regarding the construction proper to be placed upon the seventh subdivision of the second article of that treaty.

In reply to your inquiries, I answer affirmatively the three first stated by you, that, as 'each head of a family or single person over twenty one years of age' is entitled, females over twenty one being single persons, as well as widows, heads of families, come within the treaty provision; and that the term 'mixed-bloods' has been construed to mean all who are identified as having a mixture of Indian and white blood.

The particular proposition of each blood is, therefore, immaterial, where the provision is so broad as that stated in the treaty.

As regards your fourth or last inquiry, whether claimants should be required to furnish evidence of their right before you enter their names, I have to state that you should enter all names that you shall be satisfied from proper care and inquiry are mixed-bloods according to the construction above named. But as a precautionary measure, and to guard as well the rights

of the Indians as the Government, you should submit the list, when completed, for the revision of the general council of the Indians, and strike off or add to the names on such list in accordance with the facts therein ascertained. The Indians themselves, in council, by their own traditions and knowledge, will doubtless greatly aid in arriving at the facts regarding the ancestry of those who may claim under the provisions for mixed-bloods.

Care should be taken to note opposite each name who the person is, as to parentage or genealogy. This course will produce a record that will facilitate the action of this office in the settlement of all cases that may hereafter occur wherein questions of heirship arise, and be generally servicable to the Department.

Very respectfully, your obedient servant,

GEO. W. MANYPENNY, Commissioner.

Henry C. Gilbert, Esq.,

Indian Agent, Detroit, Mich."

272 it being understood and agreed that these facts are agreed upon subject to the objection on the part of the plaintiff that they are irrelevant and immaterial.

6. It Is Further Stipulated that in the administration of the Bureau of Indian Affairs relating to the Chippewa Indians on the White Earth Reservation under the Act of June 21, 1906, and the Act of March 1st, 1907, commonly known and referred to as the "Clapp Act," and particularly with reference to the issuance of fee patents to Chippewa Indians on the White Earth Reservation, applying therefor, on the ground that they (the said Indians) were mixed-bloods, the Department has not required any statement to be submitted showing the quantum of foreign blood, but has issued such fee patents upon the showing that the applicant was a mixed-blood, it being understood and agreed that these facts are agreed upon subject to the objection on the part of the plaintiff that they are irrelevant and immaterial.

CHAS. C. HOUPY,
Solicitor for Complainant.

M. C. BURCH,
Counsel for Complainant.

R. J. POWELL,
Solicitor for Defendants.

273

(Certificate of Special Examiner.)

I, J. J. Cameron, Special Examiner, appointed by the Court, to take and report to the Court the proceedings and evidence offered in the above entitled action, do hereby certify that under and by virtue of such order I did, on the 24th day of June, A. D. 1912, take in shorthand all the proceedings had before me, and I do hereby report same to the Court.

Dated June 27th, 1912.

J. J. CAMERON,
Special Examiner.

Filed in the District Court on June 26, 1912.

(Order transferring case from Sixth to Fifth Division of the District of Minnesota.)

274 In accordance with the annexed stipulation, it is by the Court

Ordered, that this cause be, and the same hereby is removed and transferred from the Sixth Division of this District, where the same is now pending to the Fifth Division thereof for trial and all subsequent proceedings, and

It Is Further Ordered, that the clerk of this court be, and he hereby is directed to forthwith transmit all the files and records in said cause to the Fifth Division of this District, except the order of removal in accordance with the rules of practice of this court, and

It Is Further Ordered, that said cause be heard before the above named court in the Fifth Division of this District.

Dated June 26, 1912.

PAGE MORRIS, Judge.

Filed in the District Court on June 26, 1912.

275

(Decree.)

The United States of America, Plaintiff,
Old No. 1184. vs. New No. 268.

Nichols Chisolm Lumber Company, Minneapolis Trust Company, and Hovey C. Clark, Defendants.

At the January Term of the United States District Court, District of Minnesota, Fifth Division, held at the United States Court Room in the City of Duluth on the twenty-sixth day of June, in the year of our Lord, One Thousand Nine Hundred and Twelve.

Present: The Hon. Page Morris, District Judge.

This cause came on to be further heard at the July term of said court on the 3rd day of September, A. D. 1912, and was argued by counsel and continued for advisement until the 14th day of September, 1912; and thereupon, upon consideration thereof it is ordered, adjudged and decreed, as follows: That the complainant is not entitled to the relief prayed for in this Bill of Complaint, and that said Bill stands dismissed out of this court without cost to the defendant.

By the Court:

PAGE MORRIS, Judge.

Dated September 27, 1912.

276

(Petition for Appeal.)

The United States of America the above named plaintiff, conceiving itself aggrieved by the decree made and entered on the 27th day of September, A. D. 1912 in the above entitled cause, does hereby appeal from said order and decree, to the United States Circuit Court of Appeals for the Eighth Circuit, for the reasons specified in the assignments of error, filed herewith, and prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Eighth Circuit.

Dated this 27th day of September, A. D. 1912.

CHAS. C. HOUP,
Solicitor for Plaintiff.

M. C. BURCH,
Of Counsel for Plaintiff.

277

(Order Allowing Appeal.)

The plaintiff in the above entitled cause, having prayed and appealed to the United States Circuit Court of Appeals for the Eighth Circuit from the decree entered in said cause on the 27th day of September, A. D. 1912, and duly presented and filed its assignments of error and prayer for reversal of said decree, the said appeal is hereby allowed.

It Is Further Ordered, That a certified transcript of the record, testimony, exhibits, and all the proceedings herein be [transfer-ed] to the United States Circuit Court of Appeals for the Eighth Circuit within sixty days from the date hereof.

It Is Further Ordered, That this appeal act as supersedeas in said cause.

Dated this 27th day of September, A. D. 1912.

PAGE MORRIS, Judge.

278

Assignment of Errors.

Comes now the above named plaintiff and files the following assignments of error upon which it relies in its appeal from the decree of this Honorable Court made and filed the 27th day of September, A. D. 1912, in the above entitled cause.

I.

The Court erred in adjudging and decreeing that the plaintiff is not entitled to the relief prayed for in the complaint herein.

II.

The Court erred in dismissing plaintiff's bill of complaint herein.

III.

The Court erred in ordering judgment for the defendants herein.

IV.

The Court erred in finding and holding that E-quay-zaince, at the time she conveyed her allotment of land described in the bill of complaint herein, was authorized and empowered so to do by reason of the terms and conditions of the so-called Clapp Amendments, the same being Acts passed June 21st, 1906 and March 1st, 1907, and found in Chapter 3504 U. S. Stat. at L., Vol. 34, part one, page 353 and Chapter 2285, U. S. Stat. at L., Vol. 34, part one, page 1034, respectively.

V.

The Court erred in finding and holding that E-Quay Zaince was, at the time she conveyed the said lands, a mixed-blood Indian within the meaning and definition of that term
279 as used in the so-called Clapp Amendments.

VI.

The Court erred in not adjudging and decreeing that the said E-quay-zaince was a full-blood Indian within the meaning and definition of that term as used in the said Clapp Amendments, and, therefore, not authorized and empowered to so convey and dispose of her said allotment of land.

VII.

The Court erred in not adjudging and decreeing that the said E-quay-zaince was not, at the time of her said conveyance, a mixed-blood Indian, and, therefore, not authorized and empowered to convey and dispose of her said allotment of land.

VIII.

The Court erred in finding and holding that the trust deed under which the said E-quay-zaince held her said allotment of land constituted a fee simple title thereto in said allottee by virtue of the said Clapp Amendments.

IX.

The Court erred in not adjudging and decreeing that the so-called trust deed under which the said E-quay-zaince held her said allotment of land was, in effect, a trust deed only, and not a muniment of title in fee simple absolute.

X.

The Court erred in not adjudging and decreeing the several conveyances and incumbrances mentioned in the bill of complaint herein to be null and void and of no effect.

XI.

The Court erred in not adjudging and decreeing that the several conveyances and incumbrances mentioned in the bill of complaint herein be set aside and held for naught, as constituting a cloud upon plaintiff's title to the land so conveyed and incumbered.

XII.

The Court erred in not granting plaintiff the relief prayed for in the complaint herein.

CHAS. C. HOUPPT,
Solicitor for Plaintiff.

M. C. BURCH,
Solicitor for Counsel.

United States of America to Nichols-Chisolm Lumber Company, a corporation, The Minneapolis Trust Company, a corporation, and Hovey C. Clarke
—Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to an appeal allowed and filed in the Clerk's Office of the United States District Court for the District of Minnesota, Fifth Division, wherein The United States of America is Appellant and Complainant and you are Appellees and Defendants, to show cause, if any there be, why the decree rendered against the said Appellant as in said decree mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Seal
U. S. District Court
Fifth Division
Dist. of Minnesota.

Witness, the Honorable Page Morris,
Judge of the District Court of the
United States for the District of
Minnesota, this 27th day of Sep-
tember, A. D. 1912.

PAGE MORRIS,
Judge of District Court.

Due Service of the foregoing Citation by Copy at Duluth Minnesota is hereby admitted this 27th day of September 1912.

R. J. POWELL,
Solicitor for Defendants.

Filed in the District Court on Sept. 28, 1912.

281

Clerk's Certificate to Transcript.

I, Charles L. Spencer, Clerk of said Court, do hereby certify and return to the Honorable the United States Circuit Court of Appeals, Eighth Circuit, that the foregoing consisting of 280 pages numbered from 1 to 280 inclusive, is a complete transcript of the records, pleadings, evidence, decrees and files and all other proceedings as required by the praecipes in cases No. 266 entitled United States of America vs. First National Bank of Detroit, Minnesota, No. 267 entitled United States of America vs. Nichols-Chisolm Lumber Company, Minneapolis Trust Company and Hiram R. Lyon, No. 268, entitled United States of America vs. Nichols-Chisolm Lumber Company and Hovey C. Clark, as appears from the original records and files of said Court; and I further certify and return that I have attached and included within said paging the original citations in each of said actions, with admissions of service upon each thereof by the solicitors of Com-

plainants, Nos. 266 and 267 and of solicitor for defendants in No. 268.

Seal
U. S. District Court
Fifth Division
Dist. of Minnesota.

In Witness Whereof I have hereunto set
my official signature as Clerk
aforesaid, and affixed the seal of
said Court at the City of Duluth,
said District and Division, this
30th day of September, A. D.
1912.

CHARLES L. SPENCER, Clerk,
By Thos. H. Pressnell, Deputy.

Filed Oct. 1, 1912. John D. Jordan, Clerk.

188 (Appearance of counsel for appellant in cause No. 3869.)

United States Circuit Court of Appeals, Eighth Circuit.

FIRST NATIONAL BANK OF DETROIT, MINNESOTA, appellant, <i>vs.</i> THE UNITED STATES OF AMERICA.	}	No. 3869.
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The clerk will enter my appearance as counsel for the appellant.

R. J. POWELL,

654 Security Bank Bldg., Minneapolis, Minn.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Oct. 5, 1912.

(Appearance of counsel for appellee in cause No. 3869.)

The clerk will enter my appearance as counsel for the appellee.

CHAS. C. HOEPT,

St. Paul, Minn.

M. C. BURCH,

W. A. NORTON,

GORDON CAIN,

512 Federal Building, Minneapolis, Minn.

(Endorsed:) Filed in U. S. Circuit Court Appeals, Oct. 11, 1912.

(Order of argument in cause No. 3869.)

December term, 1912.

WEDNESDAY, *January 15, 1913.*

This cause having been called for hearing in its regular order, argument was commenced by Mr. R. J. Powell for appellant, and the hour for adjournment having arrived further argument is postponed until to-morrow.

189 (Order of submission in cause No. 3869.)

December term, 1912.

THURSDAY, *January 16, 1913.*

This cause having been called for further hearing, argument was continued by Mr. W. A. Norton for appellee and concluded by Mr. R. J. Powell for appellant. Thereupon, this cause was submitted to the court on the transcript of record from said district court and the briefs of counsel filed herein. It is further ordered that the records and briefs in this cause be also submitted to Judge Munger.

United States Circuit Court of Appeals, Eighth Circuit.

No. 3869.—September term, A. D. 1913.

<p>FIRST NATIONAL BANK OF DETROIT, Minnesota, appellant, <i>vs.</i> THE UNITED STATES OF AMERICA, appellee.</p>	}	<p>Appeal from the District Court of the United States for the District of Minnesota.</p>
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No. 3870.—September term, A. D. 1913.

<p>NICHOLS-CHISOLM LUMBER COMPANY et al., appellants, <i>vs.</i> THE UNITED STATES OF AMERICA, appellee.</p>	}	<p>Appeal from the District Court of the United States for the District of Minnesota.</p>
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No. 3871.—September term, A. D. 1913.

<p>THE UNITED STATES OF AMERICA, appellant, <i>vs.</i> NICHOLS-CHISOLM LUMBER COMPANY et al., appellees.</p>	}	<p>Appeal from the District Court of the United States for the District of Minnesota.</p>
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191 Mr. R. J. POWELL (Mr. GEORGE T. SIMPSON and Mr. ERNEST C. CARMAN were with him on the briefs) for appellants in Nos. 3869-3870 and appellees in No. 3871.

Mr. W. A. NORTON and Mr. CHARLES C. HOUPPT (Mr. M. C. BURCH and Mr. GORDON CAIN were with them on the brief) for the United States.

Before SANBORN, circuit judge, and WILLIAM H. MUNGER and TRIEBER, district judges.

PER CURIAM:

These are suits brought by the United States against immediate and remote grantees of certain adult Chippewa Indian allottees of lands upon the White Earth Indian Reservation in Minnesota to avoid the conveyances of the allottees on the ground that these allottees were not mixed-blood Indians, but were full-blood Indians within the meaning of the act of Congress of June 21, 1906, 34 Stat., 353, which provides: "That all restrictions as to sale, incumbrance, or taxation for allotments within the White Earth Reservation in the State of Minnesota now or hereafter held by adult mixed-blood Indians are hereby removed, and the trust deeds heretofore or hereafter executed by the department for such allotments are hereby declared to pass the title in fee simple, or such mixed bloods, upon application shall be entitled to receive a patent in fee simple for such

allotments." The allottee in the case of the First National Bank of Detroit, was an adult Chippewa Indian, residing upon the White Earth Reservation who had received a trust patent to his allotment and who had white blood in his veins not exceeding $\frac{1}{32}$ of his blood. The allottee in the first Nichols-Chisolm Lumber Company case, named above, was an adult Chippewa Indian residing upon the White Earth Reservation who had received a trust patent to his allotment and who had in his veins white blood derived from some ancestor to the amount of $\frac{1}{16}$ of his blood and no more, and the allottee in the Nichols-Chisolm case secondly named above, was an adult Chippewa Indian residing on the White Earth Reservation who had received a trust patent to his allotment and who had white blood from some ancestor to the amount of $\frac{1}{8}$ and no more of his blood.

The court below was of the opinion that an adult Chippewa Indian $\frac{1}{8}$ of whose blood was white derived from a white ancestor was a 192 mixed-blood Indian, but that a Chippewa Indian less than $\frac{1}{8}$ of whose blood was white derived from a white ancestor was a full-blood Indian within the meaning of the act of Congress above cited and other acts relating to the allotments upon this White Earth Reservation, and it accordingly rendered decrees for the complainant in the first two cases, and for the defendant in the other case.

The majority of this court has reached the conclusion that every Chippewa Indian who has an identifiable mixture of other than Indian blood, however small, derived from an ancestor or ancestors that had other than Indian blood, is a mixed-blood Indian, and all other Chippewa Indians are full-blood Indians within the true intent and meaning of the act of Congress of June 21, 1906, 34 Stat., 353, and the other acts of Congress relating to this matter. Let the decrees in the first two cases accordingly be reversed, and let the decree in the third case be affirmed.

Filed November 13, 1913.

193

(Decree in cause No. 3869.)

United States Circuit Court of Appeals, Eighth Circuit.

September term, 1913.

THURSDAY, NOVEMBER 13, 1913.

FIRST NATIONAL BANK OF DETROIT, MINNESOTA,

Appellant,

vs.

THE UNITED STATES OF AMERICA.

No. 3869.

Appeal from the District Court of the United States for the District of Minnesota.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Minnesota and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said District Court, in this cause, be, and the same is hereby, reversed without costs to either party in this court.

It is further ordered that this cause be, and the same is hereby, remanded to the said District Court with directions to dismiss the bill of complaint.

NOVEMBER 13, 1913.

(Petition for appeal to Supreme Court, U. S., and order allowing same, in cause No. 3869.)

Now comes the United States of America, appellant in the above-entitled cause, and, conceiving itself aggrieved by the decree reversing the decree of the District Court of the District of Minnesota, made and entered in the above-entitled cause on the 13th day of November, 1913, and remanding said cause to the said District Court with directions to dismiss the bill of complaint, by the United States Circuit Court of Appeals for the Eighth Circuit, doth hereby appeal from said decree of said United States Circuit Court of Appeals for the Eighth Circuit to the Supreme Court of the United States.

And this appellant prays that said appeal may be allowed,
194 and that a transcript of the record and proceedings herein
and upon which said decree was made and entered, duly authenticated, may be transmitted to the United States Supreme Court.

C. C. HOURR,

*United States District Attorney
and Solicitor for Complainant.*

W. A. NORTON,

GORDON CAHN,

Of Counsel.

Ordered, that an appeal to the Supreme Court of the United States as above prayed be, and the same is hereby, allowed this 19 day of December, A. D. 1913.

WALTER H. SANBORN,

*Presiding Judge of the United States
Circuit Court of Appeals for the Eighth Circuit.*

(Endorsed): Filed in U. S. Circuit of Appeals Dec. 19, 1913.

(Assignment of errors on appeal to Supreme Court, U. S., in cause No. 3869.)

Comes now the above-named complainant and appellee, The United States of America, and makes and files the following assignment of errors upon which it will rely in its appeal from the decree of the

court above named made and entered herein on the thirteenth day of November, 1913, to wit:

I.

The court erred in reversing the decree of the District Court made and entered in this cause on the twenty-seventh day of September, 1912, and directing said District Court to dismiss the bill of complaint.

II.

The court erred in not making and entering a decree in favor of the complainant and appellee, The United States of America, and against the defendant and appellant, the First National Bank of Detroit, Minnesota.

III.

195 The court erred in adjudging and decreeing that the complainant is not entitled to the relief prayed for in the bill of complaint herein.

IV.

The court erred in finding and holding that O-bah-baum, or Rose Ellis, at the time she conveyed her allotment of land described in the bill of complaint herein, was authorized and empowered so to do by reason of the terms and conditions of the so-called Clapp amendments, the same being acts passed June 21st, 1906, and March 1st, 1907, and found in chapter 3504, U. S. Stat. at L., vol. 34, part one, page 353, and chapter 2285, U. S. Stat. at L., vol. 34, part one, page 1034, respectively.

V.

The court erred in finding and holding that O-bah-baum, or Rose Ellis, was, at the time she conveyed the said lands, a mixed-blood Indian within the meaning and definition of that term as used in the so-called Clapp amendments.

VI.

The court erred in not adjudging and decreeing that the said O-bah-baum, or Rose Ellis, was a full-blood Indian within the meaning and definition of that term as used in the said Clapp amendments, and, therefore, not authorized and empowered to so convey and dispose of her said allotment of land.

VII.

The court erred in not adjudging and decreeing that the said O-bah-baum, or Rose Ellis, was not at the time of her said conveyance a mixed-blood Indian, and, therefore, not authorized and empowered to convey and dispose of her said allotment of land.

VIII.

The court erred in finding and holding that the trust deed under which the said O bah baum, or Rose Ellis, held her said allotment of land constituted a fee simple title thereto in said allottee by virtue of the said Clapp amendments.

IX.

The court erred in not adjudging and decreeing that the so-called trust deed under which the said O bah baum, or Rose Ellis, held her said allotment of land was, in effect, a trust deed only, and not a muniment of title in fee simple absolute.

196

X.

The court erred in not adjudging and decreeing the several conveyances and incumbrances mentioned in the bill of complaint herein to be null and void and of no effect.

XI.

The court erred in not adjudging and decreeing that the several conveyances and incumbrances mentioned in the bill of complaint herein be set aside and held for naught as constituting clouds upon plaintiff's title to the land so conveyed and incumbered.

XII.

The court erred in not granting plaintiff the relief prayed for in the complaint herein.

C. C. HOURT,
U. S. Dist. Atty., Solicitor for Complainant.
 W. A. NORTON,
 GORDON CAIN,
Of Counsel.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Dec. 19, 1913.

197 United States Circuit Court of Appeals, Eighth Circuit.

Citation on appeal.

THE UNITED STATES OF AMERICA, ss:

To the First National Bank of Detroit, Minnesota, greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the city of Washington, in the District of Columbia, thirty days from and after the day this citation bears date, pursuant to an appeal allowed and filed in the clerk's office of the United States Circuit Court of Appeals for the

Eighth Circuit, wherein the United States of America is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the United States as in said appeal mentioned should not be corrected, and speedy justice should not be done to the parties on that behalf.

Witness the honorable Walter H. Sanborn, presiding judge of the United States Circuit Court of Appeals for the Eighth Circuit, this 19 day of December, A. D. 1913.

WALTER H. SANBORN,

*Presiding Judge of the United States
Circuit Court of Appeals for the Eighth Circuit.*

Due and regular service of the foregoing citation by receipt of a true copy thereof is hereby admitted this 22nd day of December, 1913, at Minneapolis, Minnesota.

R. J. POWELL,

Solicitor for The First National Bank of Detroit, Minnesota.

198 (Indorsed:) 3869, Supreme Court of the United States, October term, 1913. No. —. United States of America, appellant, vs. The First National Bank of Detroit, Minn. Citation on appeal. Filed Dec. 24, 1913. John D. Jordan, clerk.

199 (Appearance of counsel for appellants; in cause No. 3870.)

United States Circuit Court of Appeals, Eighth Circuit.

NICHOLS-CHRISOLMI LUMBER COMPANY, THE MINNEAPOLIS
Trust Company, and Hiram R. Lyon, appellants.

vs.

THE UNITED STATES OF AMERICA.

No. 3870.

The clerk will enter my appearance as counsel for the appellants.

R. J. POWELL,

654 Security Bank Bld., Minneapolis, Minn.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Oct. 5, 1912.

(Appearance of counsel for appellee in cause No. 3870.)

The clerk will enter my appearance as counsel for the appellee.

CHAS. C. HOFFT,

St. Paul, Minn.

M. C. BURCH,

W. A. NORTON,

GORDON CAIN,

512 Federal Building, Minneapolis, Minn.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Oct. 11, 1912.

(Order of argument in cause No. 3870.)

December term, 1912.

WEDNESDAY, JANUARY 15, 1913.

This cause having been called for hearing in its regular order argument was commenced by Mr. R. J. Powell for appellants, and the hour for adjournment having arrived further argument is postponed until to-morrow.

200

(Order of submission in cause No. 3870.)

December term, 1912.

THURSDAY, JANUARY 16, 1913.

This cause having been called for further hearing, argument was continued by Mr. W. A. Norton, for appellee, and concluded by Mr. R. J. Powell for appellants. Thereupon, this cause was submitted to the court on the transcript of record from said District Court and the briefs of counsel filed therein.

It is further ordered that the record and briefs in this cause be also submitted to Judge Munger.

(Opinion.)

Here follows the opinion of the United States Circuit Court of Appeals for the Eighth Circuit in cause No. 3870, which is omitted at this point for the reason that a copy thereof appears at page 190 of this transcript.

(Decree in cause No. 3870.)

United States Circuit Court of Appeals, Eighth Circuit.

September term, 1913.

THURSDAY, NOVEMBER 13, 1913.

NICHOLS CHISOLM LUMBER COMPANY, THE MINNEAPOLIS
Trust Company, and Hiram R. Lyon, appellants,

VS.

THE UNITED STATES OF AMERICA.

No. 3870.

Appeal from the District Court of the United States for the District
Minnesota.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Minnesota and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this court that the decree of the said District Court, in this cause, be, and the same is hereby, reversed without costs to either party in this court.

It is further ordered that this cause be, and the same is hereby, remanded to the said District Court with directions to dismiss the bill of complaint.

NOVEMBER 13, 1913.

(Petition for and order allowing an appeal to the Supreme Court, U. S., in cause No. 3870.)

Now comes the United States of America, appellant in the above-entitled cause, and, conceiving itself aggrieved by the decree reversing the decree of the District Court of the District of Minnesota, made and entered in the above-entitled cause on the 13th day of November, 1913, and remanding said cause to the said District Court with directions to dismiss the bill of complaint, by the United States Circuit Court of Appeals for the Eighth Circuit, doth hereby appeal from said decree of said United States Circuit Court of Appeals for the Eighth Circuit to the Supreme Court of the United States. And this appellant prays that said appeal may be allowed and that a transcript of the record and proceedings herein, and upon which said decree was made and entered, duly authenticated, may be transmitted to the United States Supreme Court.

C. C. HOUTT,

*United States District Attorney
and Solicitor for Complainant.*

W. A. NORTON,
GORDON CAIN,

Of Counsel.

Ordered, that an appeal to the Supreme Court of the United States as above prayed, be, and the same is hereby, allowed this 19 day of December, A. D. 1913.

WALTER H. SANBORN,

*Presiding Judge of the United States
Circuit Court of Appeals for the Eighth Circuit.*

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Dec. 19, 1913.

202 (Assignment of errors on appeal to Supreme Court, U. S., in cause No. 3870.)

Comes now the above named complainant and appellee, The United States of America, and makes and files the following assignment of errors upon which it will rely in its appeal from the decree of the

court above named, made and entered herein on the thirteenth day of November, 1913, to wit:

I.

The court erred in reversing the decree of the District Court made and entered in this cause on the twenty-seventh day of September, 1912, and directing said District Court to dismiss the bill of complaint.

II.

The court erred in not making and entering a decree in favor of the complainant and appellee, the United States of America, and against the defendants and appellants, the Nichols-Chiselm Lumber Company, the Minneapolis Trust Company and Hiram R. Lyon.

III.

The court erred in adjudging and decreeing that the complainant is not entitled to the relief prayed for in the bill of complaint herein.

IV.

The court erred in finding and holding that Bay-bah-mah-ge-wabe, at the time he conveyed his allotment of land described in the bill of complaint herein, was authorized and empowered so to do by reason of the terms and conditions of the so-called Clapp amendments, the same being acts passed June 21st, 1906, and March 1st, 1907, and found in chapter 3504, U. S. Stat. at L., vol. 34, part one, page 353, and chapter 2285, U. S. Stat. at L., vol. 34, part one, page 1034, respectively.

V.

The court erred in finding and holding that Bay-bah-mah-ge-wabe, was, at the time he conveyed the said lands, a mixed-blood Indian within the meaning and definition of that term as used in the so-called Clapp amendments.

VI.

The court erred in not adjudging and decreeing that the said
203 Bay-bah-mah-ge-wabe was a full-blood Indian within the meaning and definition of that term as used in the said Clapp amendments, and, therefore, not authorized and empowered to so convey and dispose of his said allotment of land.

VII.

The court erred in not adjudging and decreeing that the said Bay-bah-mah-ge-wabe was not, at the time of his said conveyance, a mixed-blood Indian, and, therefore, not authorized and empowered to convey and dispose of his said allotment of land.

VIII.

The court erred in finding and holding that the trust deed under which the said Bay-bah-mah-ge-wabe held his said allotment of land constituted a fee simple title thereto in said allottee by virtue of the said Clapp amendments.

IX.

The court erred in not adjudging and decreeing that the so-called trust deed under which the said Bay-bah-mah-ge-wabe held his said allotment of land was, in effect, a trust deed only, and not a muniment of title in fee simple absolute.

X.

The court erred in not adjudging and decreeing the several conveyances and incumbrances mentioned in the bill of complaint herein to be null and void and of no effect.

XI.

The court erred in not adjudging and decreeing that the several conveyances and incumbrances mentioned in the bill of complaint herein be set aside and held for naught, as constituting clouds upon plaintiff's title to the land so conveyed and incumbered.

XII.

The court erred in not granting plaintiff the relief prayed for in the complaint herein.

C. C. HOUP.

U. S. Dist. Atty. Solicitor for Complainant.

W. A. NORTON,

GORDON CAIN,

Of Counsel.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Dec. 19, 1913.

204 United States Circuit Court of Appeals, Eighth Circuit.

Citation on appeal.

THE UNITED STATES OF AMERICA, *vs.*

To the Nichols-Chisolm Lumber Company, the Minneapolis Trust Company, and Hiram R. Lyon, greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the city of Washington, in the District of Columbia, thirty days from and after the day this citation bears date, pursuant to an appeal allowed and filed in the clerk's office of the United States Circuit Court of Appeals for the Eighth Circuit, wherein the United States of America is appel-

lant and you are appellee, to show cause, if any there be, why the decree rendered against the United States as in said appeal mentioned should not be corrected, and speedy justice should not be done to the parties on that behalf.

Witness the Honorable Walter H. Sanborn, presiding judge of the United States Circuit Court of Appeals for the Eighth Circuit, this 19 day of December, A. D. 1913.

WALTER H. SANBORN,

*Presiding Judge of the United States
Circuit Court of Appeals for the Eighth Circuit.*

Due and regular service of the foregoing citation by receipt of a true copy thereof is hereby admitted this 22nd day of December, 1913.

R. J. POWELL,

*Solicitor for the Nichols Chisolm Lumber Company,
the Minneapolis Trust Company, and Hiram R. Lyon.*

205 (Endorsed:) 3870, Supreme Court of the United States, October term, 1913. No. —. United States of America, appellant, vs. The Nichols Chisolm Lumber Co., et al. Citation on appeal. Filed Dec. 24, 1913. John D. Jordan, clerk.

206 (Appearance of counsel for appellant in cause No. 3871.)

United States Circuit Court of Appeals, Eighth Circuit.

THE UNITED STATES OF AMERICA, APPELLANT,

vs.

NICHOLS CHISOLM LUMBER COMPANY, A CORPORATION, ET AL.

No. 3871.

The clerk will enter my appearance as counsel for the appellant.

CHAS. C. HOYT,

St. Paul, Minn.

M. C. BURCH,

W. A. SUTTON,

GOMMON CAIS,

512 Federal Building, Minneapolis, Minn.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Oct. 7, 1912.

(Appearance of counsel for appellees in cause No. 3871.)

The clerk will enter my appearance as counsel for the appellees.

R. J. POWELL,

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Nov. 16, 1912.

(Order of argument in cause No. 3871.)

December term, 1912.

WEDNESDAY, JANUARY 15, 1913.

This cause having been called for hearing in its regular order, argument was made by Mr. R. J. Powell for appellees, in connection with

his argument for appellants in cases Nos. 3869 and 3870, and the hour for adjournment having arrived further argument is postponed until to-morrow.

207 (Order of submission in cause No. 3871.)

December term, 1912.

THURSDAY, JANUARY 16, 1913.

This cause having been called for further hearing argument was commenced by Mr. W. A. Norton for appellant and concluded by Mr. R. J. Powell for appellees. Thereupon, this cause was submitted to the court on the transcript of record from said District Court and the briefs of counsel filed herein. It is further ordered that the record and briefs in this cause be also submitted to Judge Munger.

(Opinion.)

Here follows the opinion of the United States Circuit Court of Appeals for the Eighth Circuit, in cause No. 3871, which is omitted at this point for the reason that a copy thereof appears at page 190 of this transcript.

(Decree in cause No. 3871.)

United States Circuit Court of Appeals, Eighth Circuit.

September term, 1913.

THURSDAY, NOVEMBER 13, 1913.

THE UNITED STATES OF AMERICA, APPELLANT,

vs.

NICHOLS CHISELM LUMBER COMPANY, A CORPORATION, THE
Minneapolis Trust Company, and Hovey C. Clarke. } No. 3871.

Appeal from the District Court of the United States for the District of Minnesota.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Minnesota and was argued by counsel.

On consideration whereof it is now here ordered, adjudged,

208 and decreed by this court that the decree of the said District Court, in this cause, be, and the same is hereby, affirmed without costs to either party in this court.

NOVEMBER 13, 1913.

(Petition for and order allowing an appeal to the Supreme Court U. S. in cause No. 3871.)

Now comes the United States of America, appellant, and conceiving itself aggrieved by the decree affirming the decree of the District

Court of the District of Minnesota, made and entered in the above-entitled cause on the 13th day of November, 1913, by the United States Circuit Court of Appeals for the Eighth Circuit, doth hereby appeal from said decree of said United States Circuit Court of Appeals for the Eighth Circuit to the Supreme Court of the United States. And this appellant prays that said appeal may be allowed, and that a transcript of the record and proceedings herein, and upon which said decree was made and entered, duly authenticated, may be transmitted to the United States Supreme Court.

C. C. HERR,

*United States District Attorney,
and Solicitor for Complainant.*

W. A. NORTON,

GORDON CAIN,

Of Counsel.

Ordered, that an appeal to the Supreme Court of the United States as above prayed be, and the same is hereby, allowed this 19 day of December, A. D. 1913.

WALTER H. SANBORN,

*Presiding Judge of the United States Circuit Court
of Appeals, Eighth Circuit.*

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Dec. 19, 1913.

(Assignment of errors on appeal to the Supreme Court U. S. in cause No. 3871.)

Comes now the above named complainant and appellant, the
209 United States of America, and makes and files the following assignment of errors upon which it will rely in its appeal from the decree of the court above named, made and entered herein on the thirteenth day of November, 1913, to wit:

I.

The court erred in affirming the decree of the District Court made and entered in this cause on the twenty-seventh day of September, 1912, dismissing complainants' bill of complaint.

II.

The court erred in not making and entering a decree in favor of the complainant and appellant, the United States of America, and against the defendants and appellees the Nichols-Chisolm Lumber Company, a corporation. The Minneapolis Trust Company, and Hovey C. Clarke.

III.

The court erred in adjudging and decreeing that the complainant is not entitled to the relief prayed for in the bill of complaint herein.

IV.

The court erred in finding and holding that Equay-zaince, at the time she conveyed her allotment of land described in the bill of complaint herein, was authorized and empowered so to do by reason of the terms and conditions of the so-called Clapp amendments, the same being acts passed June 21st, 1906, and March 1st, 1907, and found in chapter 3504, U. S. Stat. at L., vol. 34, part one, page 353, and chapter 2285, U. S. Stat. at L., vol. 34, part one, page 1034, respectively.

V.

The court erred in finding and holding that Equay-zaince was, at the time she conveyed the said lands, a mixed-blood Indian within the meaning and definition of that term as used in the so-called Clapp amendments.

VI.

The court erred in not adjudging and decreeing that the said Equay-zaince was a full-blood Indian within the meaning and definition of that term as used in the said Clapp amendments, and, therefore, not authorized and empowered to so convey and dispose of her said allotment of land.

210

VII.

The court erred in not adjudging and decreeing that the said Equay-zaince was not, at the time of her said conveyance, a mixed-blood Indian, and therefore not authorized and empowered to convey and dispose of her said allotment of land.

VIII.

The court erred in finding and holding that the trust deed under which the said Equay-zaince held her said allotment of land constituted a fee-simple title thereto in said allottee by virtue of the said Clapp amendments.

IX.

The court erred in not adjudging and decreeing that the so-called trust deed under which the said Equay-zaince held her said allotment of land was, in effect, a trust deed only, and not a muniment of title in fee simple absolute.

X.

The court erred in not adjudging and decreeing the several conveyances and incumbrances mentioned in the bill of complaint herein to be null and void and of no effect.

XI.

The court erred in not adjudging and decreeing that the several conveyances and incumbrances mentioned in the bill of complaint herein be set aside and held for naught as constituting clouds upon plaintiff's title to the land so conveyed and incumbered.

XII.

The court erred in not granting plaintiff the relief prayed for in the complaint herein.

C. C. HOULT,
U. S. Dist. Atty., Solicitor for Complainant.
WM. A. NORTON,
GORDON CAIN,
Of Counsel.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Dec. 19, 1913.

211 United States Circuit Court of Appeals, Eighth circuit.

Citation on appeal.

THE UNITED STATES OF AMERICA, *vs.*

To the Nichols-Chisholm Lumber Company, the Minneapolis Trust Company, and Hovey C. Clark, greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the city of Washington, in the District of Columbia, thirty days from and after the day this citation bears date, pursuant to an appeal allowed and filed in the clerk's office of the United States Circuit Court of Appeals for the Eighth Circuit, wherein the United States of America is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the United States as in said appeal mentioned should not be corrected, and speedy justice should not be done to the parties on that behalf.

Witness the honorable Walter H. Sanborn, presiding judge of the United States Circuit Court of Appeals for the Eighth Circuit, this 19 day of December, A. D. 1913.

WALTER H. SANBORN,
*Presiding Judge of the United States Circuit Court
of Appeals for the Eighth Circuit.*

Due and regular service of the foregoing citation by receipt of a true copy thereof is hereby admitted this 22nd day of December, 1913, at Minneapolis, Minnesota.

R. J. POWELL,
*Solicitor for The Nichols-Chisholm Lumber, The
Minneapolis Trust Company, and Hovey C. Clark.*

212 (Indorsed:) 3871. Supreme Court of the United States. October term, 1913. No. —. United States of America, appellant, vs. The Nichols-Chisolm Lumber Co., et al. Citation on appeal. Filed Dec. 24, 1913. John D. Jordan, Clerk.

213 (Clerk's certificate.)

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of record from the District Court of the United States for the District of Minnesota as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its clerk, and full, true, and complete copies of all the pleadings, record entries, and proceedings, including the opinion had and filed in the United States Circuit Court of Appeals except the full captions, titles, and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in certain causes in said Circuit Court of Appeals wherein the First National Bank of Detroit, Minnesota, is appellant, and The United States of America is appellee, No. 3869; the Nichols-Chisolm Lumber Company et al. are appellants, and The United States of America is appellee, No. 3870; and The United States of America is appellant, and the Nichols-Chisolm Lumber Company et al. are appellees, No. 3871, as full, true, and complete as the originals of the same remain on file and of record in my office.

I do further certify that the original citation in each of said causes, with admission of service endorsed thereon, is hereto attached and herewith returned.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the city of St. Louis, Missouri, this tenth day of January, A. D. 1914.

[SEAL.]

JOHN D. JORDAN,

*Clerk of the United States Circuit Court of Appeals
for the Eighth Circuit.*

(Indorsement on cover:) File No., 24024. U. S. Circuit Court Appeals, 8th Circuit. Term No., 873. The United States, appellant, vs. The First National Bank of Detroit, Minnesota. File No., 24025. Term No., 874. The United States, appellant, vs. The Nichols-Chisolm Lumber Company, The Minneapolis Trust Company, and Hiram R. Lyon. File No., 24026. Term No., 875. The United States, appellant, vs. The Nichols-Chisolm Lumber Company, The Minneapolis Trust Company, and Hovey C. Clark. Filed January 21st, 1914. File Nos. 24024, 24025, and 24026.



Office Supreme Court, U. S.

FILED

MAR 26 1914

JAMES D. MAHER

CLERK

Supreme Court of the United States.

OCTOBER TERM, 1913.

No. 873.

THE UNITED STATES, APPELLANT,

vs.

THE FIRST NATIONAL BANK OF DETROIT, MINNESOTA.

No. 874.

THE UNITED STATES, APPELLANT,

vs.

THE NICHOLS-CHISOLM LUMBER COMPANY, THE MINNEAPOLIS TRUST COMPANY, AND HIRAM R. LYON.

No. 875.

THE UNITED STATES, APPELLANT,

vs.

THE NICHOLS-CHISOLM LUMBER COMPANY, THE MINNEAPOLIS TRUST COMPANY, AND HOVEY C. CLARK.

It is hereby stipulated by counsel for the parties to the above-entitled causes that the value of the matter in controversy in each of said causes exceeds one thousand dollars besides costs.

JNO. W. DAVIS,
Solicitor General.

C. C. DANIELS,
Of Counsel for Plaintiffs.

R. J. POWELL,
Solicitor for Defendants.

Supreme Court of the United States.

OCTOBER TERM, 1913.

No. 873.

THE UNITED STATES, APPELLANT,

vs.

THE FIRST NATIONAL BANK OF DETROIT, MINNESOTA.

No. 874.

THE UNITED STATES, APPELLANT,

vs.

THE NICHOLS-CHISOLM LUMBER COMPANY, THE MINNEAPOLIS TRUST COMPANY, AND HIRAM R. LYON.

No. 875.

THE UNITED STATES, APPELLANT,

vs.

THE NICHOLS-CHISOLM LUMBER COMPANY, THE MINNEAPOLIS TRUST COMPANY, AND HOVEY C. CLARK.

THOMAS E. HARPER, being first duly sworn, deposes and says:

That he is of the age of forty years and upwards; that he is a special agent of the United States Department of Justice, and as such has been engaged for that department upon the White Earth Indian Reservation, State of Minnesota, for upwards of four years last past, and that he is acquainted with lands thereon and the value thereof, particularly with and of the lands hereinafter described, to-wit:

The west half (W. 4) of the southwest quarter (SW. 4) of section five (5), township one hundred and forty-one (141) north, range thirty-nine (39) west of the fifth principal meridian, State of Minnesota, the same being the lands involved in the above entitled case No. 873, and being now, and on the 30th day of August, 1910, was of the value of one thousand (\$1,000) dollars and upwards.

The east half (E. $\frac{1}{2}$) of the southeast quarter (SE. $\frac{1}{4}$) of section nine (9), township one hundred and forty-two north (142), range thirty-eight (38) west of the fifth principal meridian, State of Minnesota, the same being the lands involved in the above entitled case No. 874, and being now, and on the 10th day of November, 1910, was of the value of one thousand (\$1,000) dollars and upwards.

The north half (N. $\frac{1}{2}$) of the northeast quarter (NE. $\frac{1}{4}$) of section twenty-four (24), township one hundred and forty-one north (141), range thirty-nine (39) west of the fifth principal meridian, State of Minnesota, the same being the lands involved in the above entitled case No. 875, and being now, and on the 13th day of July, 1911, was of the value of one thousand (\$1,000) dollars and upwards.

THOS. E. HARPER,

Special Agent.

Subscribed and sworn to before me this 19th day of March, 1914.

[SEAL.]

H. S. ABBOTT,

United States Commissioner,

District of Minn.

Supreme Court of the United States.

OCTOBER TERM, 1913.

No. 873.

THE UNITED STATES, APPELLANT,

vs.

THE FIRST NATIONAL BANK OF DETROIT, MINNESOTA.

No. 874.

THE UNITED STATES, APPELLANT,

vs.

THE NICHOLS-CHISOLM LUMBER COMPANY, THE MINNEAPOLIS TRUST COMPANY, AND HIRAM R. LYON.

No. 875.

THE UNITED STATES, APPELLANT,

vs.

THE NICHOLS-CHISOLM LUMBER COMPANY, THE MINNEAPOLIS TRUST COMPANY, AND HOVEY C. CLARK.

FRANK T. CARR, being first duly sworn, deposes and says:

That he is of the age of 30 years and upwards; that he is now a special employee of the Department of Justice and has been since the 1st day of February, 1914; that up to that time for a period of four years he had been continuously employed for the Department of Interior as forest guard. During all of that period he was constantly employed by the Department of Interior and the Department of Justice in examining and estimating timber and lands on the White Earth Indian Reservation, State of Minnesota; that he thereby became well acquainted with the lands and timber thereon and the value thereof, particularly with and of the lands hereinafter described, to wit:

The west half (W. $\frac{1}{2}$) of the southwest quarter (SW. $\frac{1}{4}$) of section five (5), township one hundred and forty-one (141) north, range thirty-nine (39) west of the fifth principal meridian, State of Minnesota, the same being the lands involved in the above-entitled case No. 873, and being now, and on the 30th day of August, 1910, was of the value of one thousand (\$1,000) dollars and upwards.

The east half (E. $\frac{1}{2}$) of the southeast quarter (SE. $\frac{1}{4}$) of section nine (9), township one hundred and forty-two (142) north, range thirty-eight (38) west of the fifth principal meridian, State of Minnesota, the same being the lands involved in the above-entitled case No. 874, and being now, and on the 10th day of November, 1910, was of the value of one thousand (\$1,000) dollars and upwards.

The north half (N. $\frac{1}{2}$) of the northeast quarter (NE. $\frac{1}{4}$) of section twenty-four (24), township one hundred and forty-one (141) north, range thirty-nine (39) west of the fifth principal meridian, State of Minnesota, the same being the lands involved in the above-entitled case No. 875, and being now, and on the 13th day of July, 1911, was of the value of one thousand (\$1,000) dollars and upwards.

FRANK T. CARR,

Special Employee.

Subscribed and sworn to before me this 20th day of March, 1914.

[SEAL.]

H. S. ABBOTT.

United States Comr., District of Minn.

(Indorsement:) File Nos. 24024, 24025, and 24026. Supreme Court U. S. October term, 1913. Term Nos. 873, 874, and 875. The United States, appellant, vs. The First National Bank of Detroit, Minnesota. The United States, appellant, vs. The Nichols-Chisolm Lumber Co. The United States, appellant, vs. The Nichols-Chisolm Lumber Co. Stipulation and affidavits as to value of matter in controversy. Filed March 26, 1914.



In the Supreme Court of the United States.

OCTOBER TERM, 1913.

THE UNITED STATES OF AMERICA, APPEL- lant, v. FIRST NATIONAL BANK OF DETROIT, MIN- nesota.	}	No. 873.
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THE UNITED STATES OF AMERICA, APPEL- lant, v. THE NICHOLS-CHISOLM LUMBER COMPANY et al.	}	No. 874.
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THE UNITED STATES OF AMERICA, APPEL- lant, v. THE NICHOLS-CHISOLM LUMBER COMPANY et al.	}	No. 875.
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*APPEALS FROM THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE EIGHTH CIRCUIT.*

MOTION TO ADVANCE.

The Solicitor General respectfully moves that the above-entitled causes be advanced for hearing at this term because of the public importance of the question involved.

By stipulation the suits were heard and considered on a single record in the Circuit Court of Appeals, and it is stipulated that the same course may be pursued in this court.

These suits were brought by the United States for the purpose of annulling certain instruments which had been made by Chippewa Indian allottees for the purpose of conveying their allotments within that reservation. All the allottees were adults, and they held their allotments by virtue of trust patents. The three allottees had white blood in their veins to the extent of one thirty-second, one-sixteenth, and one-eighth, respectively. The lands were not subject to alienation unless the allottees came within the meaning of the term "mixed blood Indians" as used in that paragraph of the Act of June 21, 1906 (34 Stat. 353), commonly called the Clapp amendment. The paragraph is as follows:

That all restrictions as to sale, incumbrance, or taxation for allotments within the White Earth Reservation in the State of Minnesota, now or hereafter held by adult mixed-blood Indians, are hereby removed, and the trust deeds heretofore or hereafter executed by the department for such allotments are hereby declared to pass the title in fee simple, or such mixed-bloods upon application shall be entitled to receive a patent in fee simple for such allotments; and as to full bloods, said restriction shall be removed when the Secretary of the Interior is satisfied that said adult full-

blood Indians are competent to handle their own affairs, and in such case the Secretary of the Interior shall issue to such Indian allottee a patent in fee simple upon application.

The Court of Appeals held that every Chippewa Indian who has an identifiable mixture of other than Indian blood, however small, is a mixed blood Indian, and that all other Chippewa Indians are full blood Indians within the meaning of said act.

THE QUESTION INVOLVED.

The contention of the defendants is that the statute above quoted established an arbitrary rule, whereby the protection which the Government had thrown around the Indians was withdrawn as to all who possessed an identifiable amount of blood other than Indian blood, however small. In the Government's view the act goes upon the theory that those who have a large mixture of white blood are presumed to have sufficient intelligence to be intrusted with the management and sale of their lands; that intelligence and competency were the bases on which the act was passed, and that the established customs and understanding of the Indians as to what constitutes a "mixed blood" should control its interpretation, since the statute itself provides no rule on the subject.

REASONS FOR ADVANCING THIS CAUSE.

There are now pending in the United States District Court in Minnesota about 1,200 suits brought by the Government for the purpose of removing clouds

from allotments on the White Earth Reservation. A very large portion of the lands embraced in the several thousand allotments there will be materially affected by the final determination of these causes. The decision of this court upon the principle involved will have a material bearing upon many similar suits now pending and undetermined in the lower courts and upon other lands embraced in allotments on said reservation.

I am authorized to state that counsel for the appellees concur in this motion.

JOHN W. DAVIS,
Solicitor General,

JANUARY, 1914.



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In the Supreme Court of the United States.

OCTOBER TERM, 1913.

THE UNITED STATES, APPELLANT, v. THE FIRST NATIONAL BANK OF DETROIT, MINNESOTA.	}	No. 873.
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THE UNITED STATES, APPELLANT, v. THE NICHOLS-CHISOLM LUMBER COM- PANY, THE MINNEAPOLIS TRUST COM- PANY, AND HIRAM R. LYON.	}	No. 874.
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THE UNITED STATES, APPELLANT, v. THE NICHOLS-CHISOLM LUMBER COM- PANY, THE MINNEAPOLIS TRUST COM- PANY, AND HOVEY C. CLARK.	}	No. 875.
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*APPEALS FROM THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE EIGHTH CIRCUIT.*

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

These are appeals from decrees of the Circuit Court of Appeals for the Eighth Circuit reversing two decrees of the District Court of the United States for

the District of Minnesota in favor of the plaintiff and affirming a third by which that court had dismissed the bill. See Record, p. 117, 121, for opinion of District Court, and Record, p. 189 and 208 Fed. 988, for opinion of Circuit Court of Appeals.

Suits were brought by the United States to cancel and annul as clouds upon the title certain conveyances executed, as alleged, without warrant of law, by adult Chippewa Indian allottees of lands upon the White Earth Indian Reservation in Minnesota. The answer to this attack was that these allottees and grantors were mixed blood Indians within the meaning of the acts of Congress of June 21, 1906, 34 U. S. Stat., pt. 1, ch. 3504, p. 325, 353, known as the Clapp amendment, and March 1, 1907, *ib.* ch. 2285, p. 1015, 1034, amendatory thereto, which provide:

That all restrictions as to sale, incumbrance, or taxation for allotments within the White Earth Reservation in the State of Minnesota, heretofore¹ or hereafter held by adult mixed blood Indians, are hereby removed, and the trust deeds heretofore or hereafter executed by the Department for such allotments are hereby declared to pass the title in fee simple, or such mixed bloods upon application shall be entitled to receive a patent in fee simple for such allotments; and as to full bloods, said restrictions shall be removed when the Secretary of the Interior is satisfied that said adult full blood Indians are competent to handle their own

¹ The amendment of March 1, 1907, substituted the word "heretofore" for the word "now."

affairs, and in such case the Secretary of the Interior shall issue to such Indian allottee a patent in fee simple upon application.

It was by stipulation agreed—

In case No. 873, that the allottee, O-bah-baum, or Rose Ellis, "had and has some white blood, derived from a remote white ancestor, the exact amount whereof is and was undetermined, but * * * that * * * it did not exceed one thirty-second" (R. 18);

In case No. 874, that the allottee, Bay-bah-mah-ge-wabe, "had and has one-sixteenth of white blood, no more and no less" (R. 144, 145); and

In case No. 875, that the allottee, Equay-zaince, "had and has one-eighth of white blood, no more and no less" (R. 178, 179).

The District Court was of opinion that an Indian could not be considered a mixed blood unless he possessed a quantum of white blood amounting to at least one-eighth part, and therefore granted the relief prayed in cases Nos. 873 and 874, and directed a dismissal of the bill in case No. 875.

The Circuit Court of Appeals was of opinion (R. 190) that—

* * * every Chippewa Indian who has an identifiable mixture of other than Indian blood, however small, derived from an ancestor or ancestors that had other than Indian blood, is a "mixed blood Indian" and all other Chippewa Indians are full blood Indians within the true intent and meaning of the Act

of Congress of June 21, 1906, 34 Stat. 353, and the other acts of Congress relating to this matter.

This resulted in a reversal in two of the cases, an affirmance in the third, and the dismissal of the Government's bills in all three.

The Government contends, for reasons which will be stated, that the term "mixed blood" is to be applied only to those Indians who possess a quantum of white blood amounting to one-half or more.

ASSIGNMENTS OF ERROR.

In effect the assignments of error are that—

In case No. 873: The court erred in finding and holding that O-bah-baum, or Rose Ellis, was at the time she conveyed the said lands a mixed-blood Indian within the meaning and definition of that term as used in the so-called Clapp amendment;

In case No. 874: The court erred in finding and holding that Bay-bah-mah-ge-wabe was at the time he conveyed the said lands a mixed-blood Indian within the meaning and definition of that term as used in the so-called Clapp amendment; and

In case No. 875: The court erred in finding and holding that Equay-zaince was at the time she conveyed the said lands a mixed-blood Indian within the meaning and definition of that term as used in the so-called Clapp amendment.

BRIEF OF ARGUMENT.

I. The history of the legislation involved and the disastrous effects resulting from its improper application.

II. The term "mixed blood" is to be applied only to those Indians who possess a quantum of white blood amounting to one-half or more.

1. The act should be so construed as to subserve the well-defined and well-established policy of Congress.

(a) It has been the settled policy of Congress in dealing with the Indians to make competency alone the test for removing restrictions.

(b) Congress having declared in plain and unmistakable language that lands allotted to these Indians would be held in trust for them for a period of 25 years, and the assent of the Indians to a cession of their reservation having been given in reliance upon that promise, no subsequent act of Congress should be construed to revoke this promise unless couched in language so plain and certain as to leave room for no other interpretation.

(c) Assuming the competency of the white man and the incompetency of the Indians, it is but reasonable in making a classification based on blood to include in the competent class all who have more than one-half white blood and in the incompetent class all who have more than one-half Indian blood.

2. The act is to be interpreted according to the understanding of its terms among the Indians themselves.

(a) Indian treaties and statutes modifying treaty rights will be construed as they are understood by the Indians and not necessarily in accordance with the technical terms employed by white men in framing them.

(b) Provision for mixed bloods was made in treaties with the Chippewas by their request, and the identification of such mixed bloods was left to them.

(c) That the Indians understood the words "mixed blood" in the sense for which the Government contends is clearly shown by uncontradicted testimony.

3. The meaning for which the Government contends is not foreclosed either by departmental construction or judicial decisions.

ARGUMENT

I.

History of the legislation involved and the disastrous effects resulting from its improper application.

The cases now before the court are but a fractional part of the litigation affected by the question at issue. In the effort to carry out its moral obligations to a dependent people, the Government has instituted a large number of suits of a similar character, which await the decision of these cases.

The White Earth Indian Reservation was created by the treaty of March 19, 1867, 16 Stat. 719; 2 Kappler's Treaties, 2d ed., 974. By this treaty the Chippewas of the Mississippi ceded to the United States all their remaining lands in the State of Minnesota, and in con-

sideration for this cession it was provided by article II of the treaty that "in order to provide a suitable farming region for the said bands there is hereby set apart for their use a tract of land * * *; which reservation shall include White Earth Lake and Rice Lake, and contain thirty-six townships of land." This is the White Earth Reservation.

Article VII of this treaty provided (16 Stat. p. 721):

As soon as the location of the reservation set apart by the second article hereof shall have been approximately ascertained, and reported to the office of Indian Affairs, the Secretary of the Interior shall cause the same to be surveyed in conformity to the system of government surveys, and whenever, after such survey, any Indian, of the bands parties hereto, either male or female, shall have ten acres of land under cultivation, such Indian shall be entitled to receive a certificate, showing him to be entitled to the forty acres of land, according to legal subdivision, containing the said ten acres or the greater part thereof, and whenever such Indian shall have an additional ten acres under cultivation, he or she shall be entitled to a certificate for additional forty acres, and so on, until the full amount of one hundred and sixty acres may have been certified to any one Indian; and the land so held by any Indian shall be exempt from taxation and sale for debt, and shall not be alienated except with the approval of the Secretary of the Interior, and in no case to any person not a member of the Chippewa tribe.

The General Allotment Act providing for the allotment of lands in severalty to Indians on the various reservations was passed on February 8, 1887, ch. 119, 24 Stat. 388. Section 5 of that act provided for the issuance of so-called trust patents in the following language:

That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided*, That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void, etc.

It is evident that the restrictions on alienation contained in this act and the preceding treaty, as well as

the retention of the legal title to these lands in the United States, was to protect the Indians against their own improvidence and the greed of their more civilized and astute white neighbors.

The act of January 14, 1889, ch. 24, 25 Stat. 642, commonly known as the Nelson Act, and entitled "An act for the relief and civilization of the Chippewa Indians in the State of Minnesota," provided for negotiations with the bands or tribes of Chippewa Indians in Minnesota with a view to their relinquishing to the United States all their lands in that State except so much of the White Earth and Red Lake Reservations as might not be required for the allotments provided for by that act and the previous treaty. It further declared that the allotments were to be made in conformity with the General Allotment Act of February 8, 1887, *supra*, and that its provisions should become operative only with the assent of the Indians, to be obtained by commissioners appointed for that purpose. As to all of the reservations except the Red Lake, the assent of two-thirds of the male adults on each reservation was necessary to ratification of the agreement, while the assent of two-thirds of the male adults of all the Chippewa Indians in Minnesota was necessary to a cession of the Red Lake Reservation.

As evidence of the intention of the Government to provide, and of the Indians to obtain, a permanent and inalienable dwelling place, the proceedings of these commissioners are most valuable. They experienced no little difficulty in procuring the consent of certain of the Indians. The Red Lake Indians for

several days were indisposed to give them a favorable hearing. House Ex. Doc. 247, 51st Congress, 1st session, p. 14. Serious trouble was also encountered in the conference at Leech Lake. *Ib.*, 17. As an inducement to a relinquishment of their reservation and their taking allotments in severalty the beneficial effects of citizenship and independence and security resulting from individual ownership of cultivated lands were represented to the Indians in glowing colors. It was frequently pointed out by the commissioners, and understood by the Indians, that the allotments could never be taken away from them. The Indians rightfully regarded the commissioners as being high in authority, and relied implicitly upon their representations, thinking the commissioners had the power to fulfill all their promises. (See Sen. Doc. 99, 52d Cong., 1st sess., p. 6.)

At the first council at Red Lake, Bishop Marty said:

This bill is like the net or the fish hook to take the fish out so the Indians will have plenty and be well off. As it is, your pine lands are burning; a great many pines are stolen; your property is getting less all the time and you have no benefit from it at all. But we have been appointed to help you select the very best lands on the reservation *for yourselves, to keep forever*. We must see to it that every one of you gets a good home, and when the lands which you have no use for have been

said, that money will be used to get you houses, farming implements and schools, and to make you a happy and prosperous people. (House Doc. 247, *supra*, p. 67.)

At the third council at Red Lake, Bishop Marty also said:

The first thing—now I want you all to pay attention—the first thing is that you are to choose for yourselves the best lands you can avail yourselves of, and you are not obliged to go on those lands at once. You can remain where you are and those lands will be written down for you under your name and they will belong to you and to *your children forever* (*Id.*, p. 70).

At the seventh council at White Earth, Bishop Marty further said (p. 100):

I have heard from yourselves that those Lake Superior Indians, to whom pine was allotted, are as poor to-day as they were ever. If the same course is pursued here, the same consequences will follow. If Congress had foreseen that the Indians of Lake Superior would have impoverished themselves as the result of having received allotments of pine, that plan would not have been adopted. They have squandered all they have received and Congress don't want you to get in the same condition.

At the eighth council at White Earth, Commissioner Rice, addressing the Indians, said (p. 204):

Your lands cannot be taken from you, nor your farming implements, even for debt. * * *

Your land cannot be taxed, because the President holds this land in trust for you. We have talked the matter over among ourselves with your agent and some of your intelligent and educated mixed-bloods.

At the fifth council at Leech Lake Commissioner Rice said (p. 133):

The law says expressly that no white man shall buy your allotments, although if one of you is not satisfied with his selection and wishes to change with or sell to another Indian, with the consent of the Secretary of the Interior it can be done.

At the seventh council at Leech Lake Bishop Marty, in an attempt to impress the Indians with the advantages offered them by the proposed agreement, said (p. 138):

After you are once settled permanently you cannot be removed. There is a great difference between this and all other treaties heretofore made, when men would come from the Great Father to you and leave after making promises and never come back. If that had been the plan this time, I would have had nothing to do with it, as, if it had been like other treaties, a later messenger might have repudiated what we do. We three have been appointed not only to get your consent but to make allotments. Every one of you is to take the land to which he is entitled, when we will make report to the Great Father and procure a patent for him. Our work will not be done until each man has the writing for the

land which he and his wife and children own. You will then hold your land by exactly the same title as the white man. *To make sure that you do not lose it, no white man can buy it for twenty-five years. So the land you select is to be yours forever, and it will be free from taxes for twenty-five years.*

The General Allotment Act of 1887 was amended by the act of February 28, 1891, ch. 383, 26 Stat. 794, which provided for uniform allotments of eighty acres to each Indian. This act was held by the Interior Department to limit the quantity that might be allotted to an individual on the White Earth Reservation to eighty acres, and so Congress by the act of April 28, 1904, known as the Steenerson Act, ch. 1786, 33 Stat. 539, authorized the allotment to each Chippewa Indian legally residing upon the White Earth Reservation of 160 acres of land, such allotments and the patents issued therefor to have the same effect as those provided for in the General Allotment Act.

Under the operation of these various acts the territory allotted to the Indians had been from time to time decreased. Large portions of the reservation, furthermore, were claimed and secured by the State of Minnesota under swamp-land grants, many of the Indians thereby losing their allotments and the little homes they had established for themselves. It became apparent that the boundary of the reservation could not be further reduced, and the greater portion of it had already been allotted in severalty

and was held in trust for the allottees by the United States.

On June 27, 1902, the Morris Act (ch. 1157, 32 Stat. 400) was passed, which authorized the Secretary of the Interior to sell pine timber on the reservation. By reason of this act corporations which were not permitted under the laws of Minnesota to hold over 5,000 acres of land could hold timber on as many acres of land as they could secure.

By unfair allotments of timberland, by fraudulent underestimating of standing timber, by collusion among bidders, by intentional firing of the pine forests in order that the timber might be sold as "dead and down," the Indian was studiously defrauded. (See House Rep. No. 1336, 62d Cong., 3d sess.; letter of J. R. Farr to Commissioner of Indian Affairs, dated Jan. 17, 1906, p. 1999; letter J. A. Gilfillan to Warren K. Morehead, Dec. 9, 1910, p. 2058.)

But the pressure of those who desired to have the door thrown open so that they might secure both the timber and the land allotted to these Indians was insistent. Their despoiling had been profitable and there were those who were not ready to cease working this mine until it had been exhausted.

Accordingly the act now in question, the "Clapp amendment" (*supra*), was passed on the 21st of June, 1906. The Indians were not consulted with reference to it; it was not recommended or approved by the Interior Department; it was a rider upon an appropriation bill and passed practically without notice or debate.

The views of the Department of the Interior on the subject were expressed in the act of May 8, 1906, ch. 2348, 34 Stat. 182, 183, whereby the Secretary of the Interior was authorized, whenever satisfied that an Indian allottee was competent and capable of managing his affairs, to cause a fee-simple patent to issue to such allottee, whereupon all restrictions as to sales, etc., were to be removed; and the department insisted that this power to remove restrictions should remain with it.

A letter written at this time by the gentleman representing the Minnesota district in which this reservation is located to one of his constituents explains the situation. (See House Rep. 1336, 62d Cong., 3d sess., pp. 667, 668.) In that letter he says:

The House Committee on Indian Affairs are in harmony with the views of the Department upon this question of removing the restrictions, and the commissioner and the Secretary of the Interior both insist that they should not part with the power of granting or refusing this restriction in cases presented to them. For this reason the Burke bill was recommended by the House Committee and passed. And this bill authorizes the Secretary of the Interior in any case that he deems proper to remove the restrictions; it is left entirely within the discretion of the Secretary of the Interior. Last year and the year before this was all that was asked by the towns adjoining the White Earth Reservation.

Lately, however, a demand has come both from people living near the reservation that the power of removing or retaining the restrictions should be taken from the Interior Department and vested in the courts. * * * Now, I want you to understand that you could no more pass a bill taking this power away from the Secretary in the present House of Representatives than you could fly. The Indian Affairs Committee is opposed to it and the Department is naturally opposed to it and we could not get such a measure on the calendar * * * ;

and that such a bill could not be passed

unless it went in on the appropriation bill and was, so to speak, forced upon the House, and that he would have to look to Senator Clapp for a carrying out of that plan.

The superior advantage of this latter course of procedure was later described by Senator Depew in discussing the Indian appropriation bill of March 1, 1907 (which contained the amendment to the Clapp amendment). Said he:

If a separate bill for the specific object of taking the lands away from these Indians which the Government has assigned to them and on which they are living in comfort and happiness, and dividing it up among speculators who rush over the borders and get it, is put in a bill and passes the ordeal of committees and debate in the House and Senate, then there is an opportunity for the Senators and the members of the House and these benevolent bodies to find out what is being done, and the

chances of wrong being done under such circumstances are exceedingly limited. But when an appropriation bill has passed the House and everybody who looks into that matter interested in Indians knows what it is, and it goes to the Senate there is very little scrutiny or knowledge as to what are the amendments put in here, because the general presumption is that there will not be specific legislation for special purposes. (Cong. Rec., vol. 41, pt. 3, p. 2272.)

Of course, those who had been clamorous for the passage of this act immediately proceeded to place upon it the broadest possible construction and to govern themselves accordingly. What followed can best be stated in the language of the report of the House Committee on Expenditures in the Interior Department submitted to the Sixty-second Congress after an exhaustive investigation by a subcommittee, two members of which visited the reservation and thus acquired personal knowledge of the situation (House Rep. 1336, 62d Cong., 3d sess., p. xi.):

The enactment of this legislation was followed by a period of debauchery and shameless orgies. The white and mixed-blood land sharks, the hirelings of the lumber companies, and the alleged bankers in the villages along the Soo line were engaged in taking deeds and mortgages indiscriminately from mixed and full bloods, adults and minors. The most persuasive arguments with the Indians were contained in bottles and jugs. The land sharks bought the Indians' land with "tin money";

that is, orders payable in certain "stores," in merchandise only. The lumber companies gave duebills for deeds, thus affording their mixed-blood employees ample opportunities for speculation, which opportunities were speedily improved. The result was that Indians who received the "tin money" brought back to the reservation from Detroit shoddy merchandise, broken-down pianos, ancient sewing machines, and large quantities of fire water. Indians who received the duebills were the easy victims of the sharks, who took enormous discounts for cashing their paper, and in some instances "invested" the small balance in great expectations. Comparatively few made sensible investments or even did an honest stroke of work until the results of these sales had vanished. The theory on which the law seems to rest, namely, that a slight admixture of white blood would by some magical process bring discretion and business capacity, was thus demonstrated to be without foundation, and proved to be a cruel blunder.

A blind boy, Peter Blair, was induced by his own cousin, who was a land grabber's agent, to sell his allotment, and received therefor a worthless check for a small amount on one of these so-called banks and a promise from said cousin to pay a larger sum later. When his check was presented to this bank payment was refused, and such bank claimed, and still does claim, that they received a deed from this cousin for the property in good faith, and gave the cousin credit on his indebtedness to the bank for the full price the latter paid. The

boy's story brought tears to many eyes on account of his pitiable condition.

An aged mixed blood, named Charles Bottineau, sold his allotment for \$1,000. The money was paid him in \$1 bills by a real estate "broker." Being unable to count, he tied the money up in his handkerchief and carried it directly across the street to deposit it in a "bank." The "banker" counted it and told him there was only \$640. When he remonstrated, he was greeted with abuse by both banker and broker, and his wrong never redressed. Four children of tender years, three of whom came to Washington, and one, who was sworn at Detroit, respectively, detailed how by different processes their land was taken from them.

Describing some of the things observed by the members of the subcommittee on their trip across the reservation, the report continues (p. XIX):

Scenes more pitiful than these witnessed by your subcommittee during the trip over the reservation could hardly be imagined. In the district around Pine Point, in the southeast part of the reservation, where about 500 Indians live, nearly every man, woman, and child is afflicted with trachoma, and many are totally blind from its ravages. Twenty-five per cent of these people suffer from tuberculosis and 40 per cent from other dread diseases. Each hut visited was a chamber of horrors. Sometimes 10 or more Indians were huddled together at night in a single room, trying in vain to keep

out the intense cold, but succeeding only in keeping out the fresh air, with scanty bed-clothes that reeked with filth and vermin. In unbearable stench and awful squalor little children, almost naked, aged women, blind and helpless, men, once strong but now broken by disease, live a life without hope.

Our party consisted of 10 or 11 persons. Our entrance into their wretched huts late in the night, after they had retired, and without even the form of knocking, seemed to provoke not the slightest sense of resentment; their spirit seemed entirely broken, their hope entirely gone. Their demeanor eloquently voiced the belief that they had no rights left except the right to suffer in silence.

Here are some of the pictures from actual life drawn by the newspaper men who accompanied the subcommittee on its trip over the reservation. They afterwards testified to the truth of these statements, which, so far as the subcommittee was concerned, was unnecessary, as they also witnessed the scenes described.

"A young woman, 24 years old, dying of tuberculosis, in a one-room shack; an aged mother, partially blind, lying across the foot of the bed and groping for her daughter's hands; an old man, the father, growing blind from trachoma, lying on a bed 10 feet away.

"A woman, 45 years old, whose husband died last year of tuberculosis, living in a one-room hovel, with four children under 5 years old,

and all the children suffering with trachoma; not a stick of wood in the building.

"A one-room hovel, in which 12 persons, 6 of them children, 2 babies, were living, the children all suffering from trachoma; an 18-year-old girl, who does the cooking, crippled with tuberculosis and scarred with scrofula."

Another newspaper man, who also testified to the truth of the description, gives this:

"Billy Fineday and his wife, very old, very wrinkled, blind, and absolutely helpless, were on the floor of a cabin, where friends, almost as helpless as themselves, were giving them at least a roof of shelter. They sold their allotments and have lost all trace of them. They never knew descriptions of the tracts the Government gave them, and all efforts on the part of the Government agents to learn who are the present holders of the land have failed. Their heritage has dropped into a void."

Their case is almost typical.

In having sold their allotments they did not differ from most of the others, and few indeed have anything left to show what they did with the money or goods they received.

How successful their white neighbors have been in dealing with these Indian allottees is shown to some extent by defendant's Exhibit 4, R. 83, which shows that 371,880 acres of land out of 715,960 acres have been obtained from the allottees within about four years.

II.

The term "mixed blood" is to be applied only to those Indians who possess a quantum of white blood amounting to one-half or more.

This is the Government's contention. Put in another way, the question here involved is, Did Congress, by the use of the term "mixed blood" in the act of June 21, 1906, *supra*, intend to include all Chippewa Indians having an identifiable quantum of white blood, however small?

1. The act should be so construed as to subserve the well-defined and well-established policy of Congress.

We may concede for the sake of argument that the term "mixed blood," literally construed, means a person having in his veins the blood of two or more races, no matter in what proportion; but *qui hæret in litera hæret in cortice*, and acts of Congress must be interpreted according to their intent and not always in accordance with the literal meaning of the words employed. Thus in the case of the *Church of the Holy Trinity v. United States*, 143 U. S. 457, 459, the court said:

* * * It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. This has been often asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the

judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act. As said in Plowden, 205: "From which cases it appears that the sages of the law heretofore have construed statutes quite contrary to the letter in some appearance, and those statutes which comprehended all things in the letter they have expounded to extend to but some things, and those which generally prohibit all people from doing such an act they have interpreted to permit some people to do it, and those which include every person in the letter, they have adjudged to reach to some persons only, which expositions have always been founded upon the intent of the legislature, which they have collected sometimes by considering the cause and necessity of making the act, sometimes by comparing one part of the act with another, and sometimes by foreign circumstances."

United States v. Freeman, 3 How. 556.

United States v. Lacher, 134 U. S. 624, 628.

Lionberger v. Rouse, 9 Wall. 468, 475.

Durousseau v. United States, 6 Cranch, 307, 313.

(a) It has been the settled policy of Congress in dealing with the Indians to make competency alone the test for removing these restrictions.

This is shown by treaties with many different tribes of Indians, as well as those with the Chippewas themselves. Of the latter see treaty of Sept. 26, 1833, Art. 3, 7 Stat. 431; 2 Kappler, 2d ed., 402; treaty of July 31, 1855, 11 Stat. 621, Art. I, par. 8, 2 Kappler, 2d ed., 725, 727; treaty of Oct. 18, 1864, Art. 3, 14 Stat. 657, 2 Kappler, 2d ed., 869. It is affirmed, moreover, by the act of May 8, 1906, *supra*, which authorized the Secretary of the Interior to issue fee simple patents to Indian allottees whenever satisfied that they were competent to manage their affairs. Indeed, the very act in which the Clapp amendment first appeared gave general authority to the President to continue restrictions upon alienation "for such period as he may deem best." The whole purpose of these restrictions would otherwise be lost sight of.

In the case of *Smith v. Stevens*, 10 Wall. 321, 326, Mr. Justice Davis used this language:

* * * It was considered by Congress to be necessary, in case the reservees should be desirous of relinquishing the occupation of their lands, that some method of disposing of them should be adopted which would be a safeguard against their own improvidence; and the power of Congress to impose a restriction on the right of alienation, in order to accomplish this object, can not be questioned. Without this power, it is easy to see, there would be no way of preventing the Indians

from being wronged in contracts for the sale of their lands, and the history of our country affords abundant proof that it is at all times difficult, by the most careful legislation, to protect their interests against the superior capacity and adroitness of their more civilized neighbors.

If the construction given to this act by the Circuit Court of Appeals is to prevail, then Congress as to these Indians, and these Indians alone, has abandoned all questions of competency in favor of a purely arbitrary and irrational standard.

The history of the legislation clearly demonstrates that the purpose and intent of Congress was entirely consistent with the settled policy of the Government. Unquestionably that body accepted the amendment offered by Senator Clapp on the theory and with the belief that those to whom lands had been allotted on the White Earth Reservation, who had a large admixture of white blood, were for that reason presumed to have sufficient intelligence and familiarity with business to be entrusted with the management and sale of their lands. It is fair to assume that intelligence and competency were still within the mind of Congress and that it did not intend to do so arbitrary and unjust a thing as to pass an act which would despoil the Indians while pretending to seek the betterment of their condition. The debates which accompanied the passage of the appropriation bill to which this amendment was attached as a rider, and which may be resorted to

to ascertain the history of the times and the evils which Congress had in mind, exhibit the legislative situation.

In discussing a proposed amendment relative to removing restrictions from certain Cherokee Indians who had one-sixteenth to one-fourth Indian blood, Senator Clapp said:

Certainly I can see no objection to the removal of restrictions in respect of that class of people. (Cong. Rec., vol. 40, pt. 6, p. 5738.)

Senator Bailey expressed his solicitude for the interest of the white people regardless of the effect of such legislation on the Indian. Among other things he said:

My view is this: In trying to perform the duty of wholly protecting the Indians you are imposing a great hardship upon the white man. * * * It is not practical statesmanship to try to preserve for those who can not keep and thus withhold from those who would make great advantage of it if they could obtain it now. * * * I want no misunderstanding of my position. I do not agree with the Senator from Kansas that it is in the interest of the Indians to remove these restrictions. I seek the removal of them purely in the interest of the white man. (Cong. Rec., vol. 40, pt. 7, p. 6052, 6053.)

Believing that it was the duty of Congress to take care of the interest of the Indians in legislating on Indian matters, Senator Spooner answered Mr. Bailey as follows:

The Senator from Texas is frank and manly about it. He concedes frankly that he speaks not for the interest of the Indian, but for the interest of the white man. * * * When the Senator from Texas says that this is not for the interest of the Indian, and he justifies his attitude upon the converse proposition that it is for the interest of the white man, what ought the Senate to do? Ought we to conserve the interest of the Indian in this Indian bill or ought we to be blind to the interest of the Indian, with wide-open eyes only to the interest of the white man? (*Ib.*, p. 6053.)

To this Senator Clark said (p. 6053):

I want to say to the Senator from Wisconsin that I am of the opinion that the Indian for whom he is so solicitous is not the Indian concerned in this amendment. The Indian concerned in this amendment is the Indian who has been appealing to Congress time after time, year after year, to be allowed to become, as Congress by express legislation said he should become, a citizen of the United States. It is not the blanket Indian of the western plains; it is the Indian who lives in houses, who has his household implements, who has his home, who has his property, who has his boys and girls away at college, who comes to the Supreme Court and argues cases, who is concerned in this amendment. The full-blood Indian is expressly reserved.

Senator McCumber said (p. 6054):

I desire to call the attention of the Senator from Wisconsin to one fact that appeared in

the testimony. Yesterday, when we had a committee meeting, I asked Mr. Owen, who was representing the Indians, to give me the average quantum of Indian blood in those known as mixed bloods, and he stated that it was *from an eighth to a sixteenth*; that the great number of them were above that; that there were very few of what you might call "half bloods" now; that even the half or the quarter bloods are almost unknown. So I consider that we are treating practically with white men rather than Indians.

Senator Spooner said (p. 6051):

The whole basis of this amendment is that the Indian, at least the half-breed, is able to take care of his own business interests. So be it. As to the large majority that is true. As to the large minority confessedly it is not true.

Throughout the whole discussion there was not the slightest intimation of the purpose to abandon competency as the basis for the removal of the restrictions placed upon the sale of allotted lands. On the contrary, all who advocated any change in the method of dealing with the Indians expressly recognized the fact that the competency of an Indian to manage his own affairs is a necessary condition precedent for the withdrawal of governmental protection.

In the next Congress a slight change was made, as heretofore noted, in the Clapp amendment by the substitution of the word "heretofore" for the word "now." In offering this amendment Senator Clapp,

still Chairman of the Committee on Indian Affairs, made this explanation:

Last winter we passed a law providing that "all restrictions as to the sale, incumbrance, or taxation for allotments within the White Earth Reservation, in the State of Minnesota, now or hereafter held by adult mixed blood Indians are hereby removed."

The question has arisen under that act, where an Indian had received an allotment, but had died before the passage of that act, whether it would cover such a case. The Department has proceeded upon the theory that it would, but the difficulty is that it simply throws a question upon the Indian's title and enables him to deal with less advantage than if the question was cleared up. It is for the purpose of clearing it up that I have offered this amendment. (Cong. Rec., vol. 41, pt. 3, p. 2337.)

In response to a question from Senator Spooner, Senator Clapp stated: "I think there are somewhere between 900 and 1100 mixed bloods who are affected by these removal restrictions."

The number of allottees on the reservation who have as much or more of white than Indian blood is somewhat in excess of the number named by Senator Clapp, but if the test of mixed blood adopted by the Court of Appeals is to stand it would probably have been as well if the restrictions had been removed from all allottees. The uncertainty would have been eliminated and an honest man who desired the land

could have bought it at a fair price instead of leaving the allottees in the hands of unscrupulous speculators willing to take a gambler's chance to secure land and timber at inadequate prices, and in many instances to defraud the allottee out of the price promised. The number stated by Senator Clapp was a confirmation of the belief of the Senate that, in the words of Senator McCumber, "we are treating practically with white men rather than Indians."

- (b) Congress having declared in plain and unmistakable language that lands allotted to these Indians would be held in trust for them for a period of twenty-five years, and the assent of the Indians to a cession of their reservation having been given in reliance upon that promise, no subsequent act of Congress should be construed to revoke this promise unless couched in language so plain and certain as to leave room for no other interpretation.

There can be no question that the Indians were assured by the commissioners appointed to conduct negotiations with them that upon taking allotments in severalty they would acquire titles of which they could not be divested in any manner, either by sale, taxation, or forfeiture, for a period of 25 years. It is not to be lightly assumed that Congress, without consulting the Indians, and apparently without forethought, would deliberately modify its established policy and withdraw from those who still needed it the protection thus solemnly promised.

We do not deny the power of Congress to abrogate the terms of an Indian treaty or to withdraw at pleasure from an Indian allottee the protecting arm of the Government; but we insist that this can only be done by the employment of language so clear as to

leave no room to question either its purpose or its scope. It is not a power to be lightly exercised. As was said by this court in *Lone Wolf v. Hitchcock*, 187 U. S. 553, 566:

The power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so. When, therefore, treaties were entered into between the United States and a tribe of Indians it was never doubted that the power to abrogate existed in Congress, and that in a contingency such power might be availed of from considerations of governmental policy, particularly if *consistent with perfect good faith towards the Indians*.

- (c) Assuming the competency of the white man and the incompetency of the Indians, it is but reasonable in making a classification based on blood to include in the competent class all who have more than one-half white blood and in the incompetent class all who have more than one-half Indian blood.

The adoption of any other rule inevitably leads to absurdity. Appellees will contend that the act created two classes—full bloods and mixed bloods. But is it conceivable that Congress intended to create a class of mixed bloods in which the slightest amount of blood other than Indian was sufficient to transform an Indian who could not read or speak the English language, and whose training and man-

ner of life had been like that of his ancestors before him—that of an uneducated uncivilized Indian—into one removed from the protecting care of the Government?

Did Congress intend to say that if one of the ancestors of an Indian ten generations back was a negro, that the Indian by the infusion of that strain of blood would establish the conclusive presumption that he was intelligent enough to cope with the white man and protect himself from the shrewd and unscrupulous? Would it not be a reflection upon the intelligence of Congress to answer these questions in the affirmative?

Can it be supposed that an Indian with one sixty-fourth white blood is any more a white man than is a white man with one sixty-fourth Indian blood an Indian? Can it be supposed that Congress by the Clapp amendment intended to include in the same class an intelligent and well educated white man with a small quantum of Indian blood in his veins, like some of those who now hold high governmental office, and an ignorant, illiterate, incapable Indian with even one-sixteenth part of white blood in her veins, like Ne-bin-ay-ge-shig (R. 85, 88), who could not write her own name? To ask this question is to answer it. Yet this is the absurd conclusion to which the logic of the Court of Appeals must lead us.

This court said in the *Holy Trinity Church* case, *supra* (p. 460), quoting with approval from *State v. Clark*, 29 N. J. L. 96:

"If a literal construction of the words of a statute be absurd, the act must be so construed as to avoid the absurdity. The court must restrain the words. The object designed to be reached by the act must limit and control the literal import of the terms and phrases employed."

Again quoting with approval from *United States v. Kirby*, 7 Wall. (p. 461), 482:

"All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter."

It may be suggested again that if Congress intended to remove restrictions from Indians having only one-fourth or one-eighth or even a less quantum of white blood, it would have been easy to so frame the law, and from this appellees argue that the term "mixed blood" should be given the widest possible latitude. This may be aptly answered in the language of this court in the case of the *Holy Trinity Church*, *supra*, wherein it was said (p. 472):

Suppose in the Congress that passed this act some member had offered a bill which in terms declared that, if any Roman Catholic Church in this country should contract with Cardinal Manning to come to this country and

enter into its service as pastor and priest; or any Episcopal church should enter into a like contract with Canon Farrar; or any Baptist church should make similar arrangements with Rev. Mr. Spurgeon; or any Jewish synagogue with some eminent Rabbi, such contract should be adjudged unlawful and void, and the church making it be subject to prosecution and punishment, can it be believed that it would have received a minute of approving thought or a single vote? Yet it is contended that such was in effect the meaning of this statute. The construction invoked cannot be accepted as correct. It is a case where there was presented a definite evil, in view of which the legislature used general terms with the purpose of reaching all phases of that evil, and thereafter, unexpectedly, it is developed that the general language thus employed is broad enough to reach cases and acts which the whole history and life of the country affirm could not have been intentionally legislated against. It is the duty of the courts, under those circumstances, to say that, however broad the language of the statute may be, the act, although within the letter, is not within the intention of the legislature, and therefore cannot be within the statute.

Can we doubt what fate would have overtaken a bill proposing to Congress in plain terms the repeal of these restrictions as to every Indian who, regardless of his character or competency, had in his veins the slightest trace of foreign blood?

2. The act is to be interpreted according to the understanding of its terms among the Indians themselves.

Not only are we entitled to read the act in the light of the presumptive intent of Congress, but since Congress itself did not define the meaning of the term "mixed blood," we may and must go to the Indians for information on that subject.

- (a) Indian treaties and statutes modifying treaty rights will be construed as they are understood by the Indians and not necessarily in accordance with the technical terms employed by white men in framing them.

In *Jones v. Meehan*, 175 U. S. 1, 10, the court announced this rule and the reason for it in the following language:

In construing any treaty between the United States and an Indian tribe, it must always * * * be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and

that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.

See also *Starr v. Long Jim*, 227 U. S. 613, 622.

By the act of March 3, 1871, ch. 120, 16 Stat. 544, 566—sec. 2079, R. S.—the United States declared that it would no longer recognize any Indian nation or tribe as a treaty-making power. Since that time it has governed them by acts of Congress. *United States v. Kagama*, 118 U. S. 375.

It follows as a natural consequence that where these acts take the place of treaties the same rules of interpretation should apply, and so much we understand appellees to concede.

- (b) Provision for mixed bloods was made in treaties with the Chippewas by their request, and the identification of such mixed bloods was left to them.

There is a peculiar reason for applying this rule of construction in the present case, for it appears that it was the Chippewa Indians themselves and not the Government who caused provision to be made in the several Indian treaties for their half-breed or mixed-blood relatives, and the identification of those for whom they had thus provided was left to the Indians themselves. A résumé of these treaties will make this clear.

At least as early as 1817 white blood was mixing with the Indian blood, for in the treaty with the

Chippewas and other tribes made on September 29, 1817, 7 Stat. 160, provision was made for "persons connected with the said Indians by blood or adoption," and for white persons taken captive and who had married and settled in the tribe. This provision was made "at the special request of the Indians."

In 1826 the mixed-blood relatives of the Chippewa Indians had evidently become more numerous. In a treaty made in that year (Aug. 5, 1826, Art. 4, 7 Stat. 290) we find provision made for them by grant of 640 acres each, the purpose of which is stated as follows:

It being deemed important that the *half-breeds*, scattered through this extensive country, should be stimulated to exertion and improvement by the possession of permanent property and fixed residences, *the Chippewa tribe, in consideration of the affection they bear to these persons, and of the interest which they feel in their welfare, grant to each of the persons described in the schedule hereunto annexed, being half breeds and Chippewas by descent*, and it being understood that the schedule includes all of this description who are attached to the Government of the United States, six hundred and forty acres of land. * * * The persons to whom grants are made shall not have the privilege of conveying the same, without the permission of the President.

Here, again, is the special provision for the half-breed relations of the Indians, at the instance of the Indians.

The words "Chippewa by descent" could only mean that the Indian blood of these half-breed relatives was blood of the Chippewa Indians, as distinguished from other Indian blood.

In 1829 we find provision made, at the request of the Indians, for certain persons "*being descendants from Indians,*" and who are named in the treaty. Chippewa treaty of July 29, 1829, Articles 4 and 5, 7 Stat. 320.

In 1836, special provision was made for the "half-breed relatives" of the Chippewas, as follows (7 Stat. 491, 493):

ARTICLE SIXTH. The said Indians being desirous of making provision for their *half breed relatives*, and the President having determined, that individual reservations shall not be granted, it is agreed, that in lieu thereof, the sum of one hundred and fifty thousand dollars shall be set apart as a fund for said half-breeds. No person shall be entitled to any part of said fund, unless he is of Indian descent and actually resident within the boundaries described in the first article of this treaty, nor shall any thing be allowed to any such person, who may have received any allowance at any previous Indian treaty. The following principles, shall regulate the distribution. A census shall be taken of all the men, women, and children coming within this article. As the Indians hold in higher consideration, some of their half-breeds than others, and as there is much difference in their capacity to use and take care of property, and,

consequently, in their power to aid their Indian connexions, which furnishes a strong ground for this claim, it is, therefore, agreed, that at the council to be held upon this subject, the commissioner shall call upon the Indian chiefs to designate, if they require it, three classes of these claimants, the first of which, shall receive one-half more than the second, and the second, double the third. * * * Out of the said fund of one hundred and fifty thousand dollars, the sum of five thousand dollars shall be reserved to be applied, under the direction of the President, to the support of such of the poor half breeds, as may require assistance, to be expended in annual instalments for the term of ten years, commencing with the second year. Such of the half breeds, as may be judged incapable of making a proper use of the money, allowed them by the commissioner, shall receive the same in instalments, as the President may direct.

This article makes manifest:

That the Indian, and the Indian *only*, was the person to whom the obligation of the people of the United States ran, and that the "half-breed relatives" were included in the treaty merely as beneficiaries at the hands of the Indians, who desired to provide in some manner at their own expense for their "half-breed relatives."

Note, also, that "a census shall be taken of all coming within this article"; and that "as the *Indians* hold in higher consideration some of their half-breeds than others * * * at the council

to be held upon this subject, *the commissioner shall call upon the Indian chiefs to designate * * * three classes of these claimants.*"

In 1837, the "half breeds of the Chippewa Nation" are again provided for by treaty, and the language following is used:

It is the *wish of the Indians* that their two sub-agents * * * superintend the distribution of this money among *their half-breed relations*. (Chippewa Treaty of July 29, 1837, Art. 3, 7 Stat. 536, 537.)

Special provision was again made for "half-breed" relatives in the year 1842, as follows:

Whereas the Indians have expressed a strong desire to have some provision made for their *half-breed relatives*, therefore it is agreed that * * * shall be paid to said Indians, * * * as a present, to be disposed of, as they, together with their agent, shall determine in council. (Chippewa Treaty of Oct. 4, 1842, Art. 4, 7 Stat. 591, 592.)

A treaty made in 1847, with the Chippewas of the Mississippi and Lake Superior, provided as follows:

It is stipulated that *the half or mixed-bloods of the Chippewas* residing with them *shall be considered Chippewa Indians, and shall, as such, be allowed to participate in all annuities* which should hereafter be paid to the Chippewas of the Mississippi and Lake Superior, due them by this treaty, and by the treaties heretofore made and ratified. (Chippewa Treaty of Aug. 2, 1847, Art. 4, 9 Stat. 904.)

The provision above was *stipulated* between the parties, and did not change the relation of the half or mixed blood to the Indian; nor did it create any relation between the Government and the half or mixed bloods of the Chippewas. If the words "shall be considered Chippewa Indians, and, as such," had been omitted, the meaning and effect would have been the same—no more and no less. Its whole effect was to give place to the half or mixed bloods in line with the Indians, on annuity payment days, *while the specified annuities lasted*.

In the treaty of 1855 the following provision was made:

And such of the mixed bloods as are heads of families, and now have actual residences and improvements in the ceded country, shall have granted to them, in fee, eighty acres of land, to include their respective improvements. (Art. 6, 10 Stat. 1165.)

Here was evidently a purpose to so establish the mixed blood relation that he could be self-sustaining and his elimination from the Indian situation accomplished.

In the same treaty is the following provision:

That an amount not exceeding \$10,000
* * * shall be paid to such full and mixed
bloods as the chiefs may direct, for services
rendered to their bands. (See Art. 3.)

Here was a special provision made to both full and mixed bloods, and the designation of the beneficiaries left to the chiefs, the Government not being con-

cerned in that designation or in the terms of the distribution of the moneys provided.

It will be noted with reference to these treaties that the term "mixed blood" appears for the first time in the treaty of August 2, 1847, 9 Stat. 904, where the phrase is "half or mixed bloods." Prior to that time the words "half bloods" or "half-breed" alone had been used, and doubtless the new term was used in this treaty either as a synonym or with reference to the children and grandchildren of half-breeds, many of whom doubtless possessed more than three-fourths white blood, and who were declared entitled to tribal benefits only when they continued to reside with their Indian kinsmen.

It is apparent in all these treaties that the United States was not concerned with the question of these half bloods. They were treating either through agents or representatives of the Chippewa Indians, who in turn gave up their property to their half-breed or mixed-blood relations, and in many, indeed if not in all, instances, the designation of these half-breed or mixed-blood beneficiaries was left to the Indians themselves, either alone or in conjunction with representatives of the United States. Who, then, better than the Indians themselves should know the meaning to be attached to these phrases? What the chiefs, sachems, and headmen of the treaty-making days knew, their successors of this day know as well.

The United States Chippewa Indian Commission appointed under the act of January 14, 1889, *supra*,

recognizes this state of affairs in their report, in which they say:

In Michigan, Wisconsin, and elsewhere we know there are persons of Chippewa blood that will claim, and no doubt many are entitled to, the benefits under the recent negotiations, who were, from their higher education and associations, forced to separate from their bands and seek a living and more congenial society elsewhere, who now that they can hold lands in severalty and come under the protection of the law will return to their old homes; for such consideration should be given hereafter. We think, however, that the safe rule to be observed will be to consult the chiefs and headmen as to the justice of their claims. (See H. Ex. Doc, No. 247, 51st Cong., 1st sess., p. 26.

(c) **That the Indians understood the words "mixed blood" in the sense for which the Government contends is clearly shown by uncontradicted testimony.**

The evidence of three old Indian chiefs on this subject is in the record uncontradicted. One of them is a survivor of the ten chiefs who signed the treaty of 1867 creating the White Earth Reservation. They say it was only after the white people began to buy their lands that they ever heard any definition of a mixed blood other than that which the Indians had always recognized. The controlling force of this testimony justifies its reproduction here.

Witness Mah-een-gaunce (R. 102):

I am a chief of the Mille Lac Band of Mississippi Chippewas residing on the White Earth Reservation, State of Minnesota. I am seventy (70) years of age, and until the mixed-bloods were allowed to sell their lands did not understand what the white people would call a mixed blood. With the Indians, when a white man married an Indian woman, their children were called half-breeds or mixed-bloods; if those children married a white man or woman their children were still mixed-bloods; but if they were to marry an Indian, the children of this marriage would be Ah-nay-she-naby, (Indians, or of our people); for instance, Un-nah-zahn, is a mixed-blood and married an Indian woman, we consider their children to be Ah-nay-she-naby (or Indians) and that is the way the Indians rated one another before they were allowed to sell their allotments.

Witness Mah-je-ge-shig (R. 103):

I reside on the White Earth Reservation, State of Minnesota. I am a Chippewa Indian nearly seventy-five (75) years of age and became chief of my band at the death of my father, Do-co-god, who was chief before me. I signed a paper asking for the treaty of March 19, 1867, creating the White Earth Reservation, but did not go to Washington with the delegation of chiefs. In that treaty it says that no annuities will be paid to any half-breed or mixed-blood except those living on the reservation. That meant those mixed-bloods that came from Wisconsin, and were

not allowed to live on the Indian's side of the river. Kag-gog, Baush-kin-aince, Kah-do-kin, Che-be-nay, and Ah-ke-wen-zie-be-nah-zha, were brothers and half-breeds, their father being a Frenchman, but they married Indian women and their children were Indians; Joe Critt's father was a Frenchman, that made him (Joe Critt) a half-breed or mixed-blood, but his children by his Indian wife were Indians. E-quay-we-do-gay is an Indian; she married a half-breed or mixed-blood, but we considered her children as Indians. If a half-breed or mixed-blood, as we call them, married another mixed-blood, or a white man or woman, their children would be mixed-bloods. That is all the kind of half-breeds or mixed-bloods that I ever heard of until the Indians were allowed to sell their land then the land buyers tried to make all of us mixed-bloods. We have two words to express our way of thinking about the blood of our people: One means an Indian, the other means one not an Indian; and before they began to buy our land, they were used as I have told you. I do not know who first changed the meaning of the words.

Witness May-zhur-e-ge-shig (H. 103-104):

I reside on the White Earth Reservation, State of Minnesota. I am the hereditary head chief of the Mississippi Band of Chippewa Indians. I am over eighty (80) years of age, and the last living of the ten chiefs that went to Washington and signed the treaty creating the White Earth reservation; in that treaty we

said that no half-breed or mixed-blood except those living on the reservation should receive any benefit from the annuities on the new Reservation. We had a few mixed bloods with us, but more that lived off the reservation. What we mean by a half-breed or mixed blood is this: My daughter is married to a white man, her children are mixed bloods; if they marry a white man, their children will be mixed bloods; if they marry an Indian, their children will be Indians. We do not think as the people do that have bought our land; they have said that if the Indians had a cousin that was a mixed blood, that made the Indians a mixed blood. We have two words to tell what we want to say; one is what we use when we mean an Indian, and the other when we mean they are mixed bloods.

It appears from the uncontradicted testimony of these three old Indians that the Chippewa Indians have no word to express "full blood," but that the word "Ahnishinabe," which means Indian or of "our people" is the word used by them when they speak of a "full blood" Indian. The word "We-sah-co-day-we-ne-ne" (or "Wissâkodéwinini") is defined in the dictionary of the Chippewa language (Baraga, *Ojibpwe* Eng. Dict. 421) as: "They call the half-breeds so, because they are half dark, half white, like a half-burnt piece of wood, burnt black on one end, and left white on the other." This is the word they use when they speak of a mixed blood. What constitutes an Ahnishinabe, or Indian, and what constitutes a We-sah-co-day-we-ne-ne, or mixed blood,

according to the language, traditions, and customs of the Indians is made perfectly clear by the testimony of these witnesses, showing conclusively that the Indians drew the line at the one-half mark, counting and denominating as Indians all those having more Indian than white or other blood and counting and denominating as half-breeds or mixed bloods all those having no more Indian than white or other blood.

We call attention again to the statement of Senator Owen hereinbefore quoted, who, when asked before a committee of the Senate to give the average quantum of Indian blood in those known as "mixed bloods," among the Five Civilized Tribes, stated "that it was from an eighth to a sixteenth; that the great number of them were above that; that there were very few of what you might call 'half bloods' now; that even the half or the quarter bloods are almost unknown"; whereupon Senator McCumber remarked: "So I consider that we are treating practically with white men rather than Indians."

In the absence of any standard set up by the act, we may justly adopt that which prevailed among the people affected by it.

3. **The meaning for which the Government contends is not foreclosed either by departmental construction or judicial decisions.**

(a) **Departmental construction.**

The appellées contended in the court below that the term "mixed bloods" had received a departmental construction adverse to the Government's

contention, and by which it is now bound. Whether such considerations should apply when the Government is proceeding in behalf of the Indians may be rightly doubted. *Nor. Pac. Ry. Co. v. U. S.* 227 U. S. 355.

Just what is necessary to constitute a departmental construction, however, and how far it is entitled to respect has been repeatedly declared. In *Merrill v. Cameron*, 137 U. S. 532, 554, this court said:

* * * A regulation of a department, however, cannot repeat a statute, neither is a construction of a statute by a department charged with its execution to be held conclusive and binding upon the courts of the country, unless such construction has been continuously in force for a long time. The cases cited go to that extent and no further. In regard to the law under consideration the construction of it by the Treasury Department has not been uniform. The construction contended for by defendants in error first arose in 1876 and lasted only until 1885, since which time the construction has been the same as in this decision. There is no such long and uninterrupted acquiescence in a regulation of a department, or departmental construction of a statute, as will bring the case within the rule announced at an early day in this court, and followed in very many cases, to wit, that in case of a doubtful and ambiguous law the contemporaneous construction of those who have been called upon to carry it into effect is entitled to great respect, and should not be dis-

regarded without the most cogent and persuasive reasons. (Citing *Edwards v. Dartmouth*, 12 Wheat 206.)

In *Demers v. Smith*, 106 Fed 438, 444, the court used this language:

It is strenuously insisted that this construction of the acts of Congress by these various controllers and the uniform practice of their office for 31 years should have great if not controlling weight in the decision of this question. The opinions of officers of any department of the government relative to the construction of a statute whose execution has been committed to them to the Congress of the United States are always persuasive and entitled to careful consideration when the statute is ambiguous, or the question at issue is doubtful. But the decisions of the officers of the executive departments of the Government upon the construction of the act of Congress are not conclusive and the duty of a court is to exercise its own judgment in considering and determining the issues presented to it is imperatively and unavoidably. Hence, where the facts and meanings of an act of Congress are plain, and a court is convinced upon reason and authority that a correct determination of the question before it requires a decision contrary to the construction and practice of the officers of the executive department of the government, that determination must prevail, and that decision must be rendered. The courts cannot lawfully renounce their judicial powers in favor of opinions of officers.

of other Departments. (Citing *Hartman v. Warren*, 76 Fed. 157; *Webster v. Luther*, 163 U. S. 331, 179; *United States v. Tinner*, 147 U. S. 661, 663, and many others.)

We submit that the record not only fails to show that the Department of the Interior has at any time through any responsible officer construed the words "mixed blood Indian" as used in the Clapp amendment, but on the contrary it is shown that there has been no such construction.

A letter from George W. Manypenny, Commissioner of Indian Affairs, to Henry C. Gilbert, Indian agent, dated June 15, 1855, is introduced and relied upon. (R. 19, 20.) This letter had to do with the Chippewa treaty of September 30, 1854, 10 Stat. 1109, 2 Kappler's Treaties, 2d ed., 648, article 2, clause 7, of which provided:

Each head of a family or single person over twenty-one years of age at the present time of the mixed bloods, belonging to the Chippewas of Lake Superior, shall be entitled to eighty acres of land, to be selected by them under the direction of the President, and which shall be secured to them by patent in the usual form.

Article 3 of the same treaty also authorized the President to assign eighty acres of land to each head of a family or single person over twenty-one years of age, and to issue patents "as fast as the occupants become capable of transacting their own affairs."

It will be observed that this treaty made provision for all Indians and all "mixed bloods," and the

only difficulty which would arise as to the latter would be that when the percentage of Indian blood became small they might be justly considered whites. As Commissioner Manypenny says (R. 20):

That the term "mixed blood" has been construed to mean all who are identified as having a mixture of Indian and white blood.

The particular proportion of each blood is, therefore, immaterial, where the provision is so broad as that stated in the treaty.

The letter serves to confirm our contention that we must go to the Indian for the true and proper definition of the term "mixed blood," for Commissioner Manypenny goes on to say:

* * * I have to state that you should enter all names that you shall be satisfied from proper care and inquiry are *mixed-bloods* according to the construction above named. But, as a precautionary measure, and to guard as well the rights of the Indians as the Government, you should submit the list, when completed, for the revision of the general council of the Indians, and strike off or add to the names on such list in accordance with the facts therein ascertained.

There was introduced a portion of the roll of Indian allottees on the White Earth Indian Reservation, dated the 31st of December, 1910 (R. 84, 85), containing the names of nine Indians having less than one-half white blood, one having one-half white blood, and one more than one-half white blood; and along

with this a showing that in the year 1908 the issuance of fee-simple patents was recommended to three of these Indians on the ground that they were adult mixed bloods, and in the year 1910, also before the filing of this roll, of three others; and this, it is insisted, was a recognition by the department of the construction of the act for which the appellees contend. This is met, however, by the showing that four of the Indians on this roll, including one alleged to possess one-half white blood and the one possessing more than one-half white blood, were refused fee-simple patents on the ground that their "mixed-blood" status was doubtful, and by the further fact that E. H. Long, special assistant to the Attorney General, and J. H. Hinton, special agent, by whom these recommendations were made, wrote on October 6, 1910, to the Commissioner of Indian Affairs asking for a construction of the term "mixed bloods" (R. 75), and were answered on November 19, 1910, by Mr. C. F. Hauke, Second Assistant Commissioner of Indian Affairs (R. 71), who declined, as his letter shows and as he himself testified (R. 64), to give any conclusive opinion on the subject, but promised further advice after conference with the Department of Justice. Mr. R. G. Valentine, Commissioner of Indian Affairs since June, 1909, and prior thereto private secretary to the commissioner, and assistant commissioner, testified that as Commissioner of Indian Affairs he had never given any official construction to the term "mixed blood" (R. 69), and Mr. J. F. Allen, Chief of the Land Divi-

sion during the year 1906-1907, negatives the idea that in issuing fee simple patents on the formal statements filed by Messrs. Long and Hinton the question of what constitutes a mixed blood was raised or passed upon (R. 66, 67).

Nor is there any greater force in the statement of Simon Michelet, formerly Indian agent at White Earth, who came to Washington soon after the passage of the act to ascertain the construction to be placed upon the term "mixed bloods." The very fact of his coming would seem to indicate that the application of the term in its literal sense was not so obvious a thing as appellees would have us believe. He was referred to the Lands Division in the Indian Office, and particularly to a Mr. Good, as to whose office, functions, or authority we are given no information whatever. With this Mr. Good he agreed that an application by any allottee for a fee simple patent should be accompanied by an affidavit of two members of the tribe that the member was an adult "mixed blood" Chippewa Indian, and, further, that the act did not require a showing of any definite quantum of foreign blood to constitute a "mixed blood" (R. 80). The best that can be said of this testimony is that it was at least a very peculiar method of obtaining departmental light upon so important and vital a question; so peculiar, in fact, as to suggest that Mr. Michelet was more easily contented with the opinion of some subordinate who agreed with him than with the responsible head of

the Bureau of Indian Affairs or of the Department of the Interior, who might not have been so complacent.

It is respectfully submitted that there was no evidence offered worthy of the name which tends to show that the Interior Department has, either by express order or by a continued and consistent course of conduct, officially construed the Clapp amendment.

(b) **Judicial decisions.**

So far as we are advised, there has been no judicial determination of the exact meaning of the term "mixed blood" when used as in the statute under discussion. In *Jeffries v. Ankeny*, 11 Ohio, 372, 375, where the words "free white citizens" were under consideration, the court said:

* * * In 1831, in the case of *Polly Gray v. The State of Ohio*, 4 Ohio Rep. 354; and in 1833, in the case of *Williamson v. The School Directors, &c.*, Wright's Rep. 178, it was held that, in the constitution and the laws on this subject there were enumerated three descriptions of persons; whites, blacks, and mulattoes; upon the two last of whom disabilities rested; that the mulatto was the middle term between the extremes, or the offspring of a white and a black; that all nearer white than black, or of the grade between the mulattoes and the whites, were entitled to enjoy every political and social privilege of

the white citizen; that no other rule could be adopted, so intelligible and so practicable as this; and that further refinements would lead to inconvenience, and to no good result.

Accordingly, the court held that the offspring of a white man and a half-breed Indian woman was a "free white citizen" within the meaning of the constitution and entitled to vote. See also—

Thacker v. Hawk, 11 Ohio, 376.

Lane v. Baker, 12 Ohio, 237.

Little light is thrown upon the question by the discussions in constitutional conventions engaged in framing the suffrage provisions of State constitutions, or by State statutes aimed at preventing the amalgamation of the white and negro races, or by the decisions of courts of the different States in discussing the question of what is or is not negro blood.

In most of these discussions, acts, and decisions there are reflected those peculiar conditions, historic, political, social, and economic, which have attended the relations between the white and negro races in this country and for which there is no parallel whatever in the relations between whites and Indians. Language which has been used in the one case, therefore, may be ill advised or inappropriate with reference to the other.

The true guide is and must continue to be the intent of the legislature in each instance as applied to the subject matter then in hand.

CONCLUSION.

The decrees of the Circuit Court of Appeals should be reversed, and the causes remanded with directions to enter a decree for the complainant in each case.

JOHN W. DAVIS,
Solicitor General.

C. C. DANIELS,
Attorney.

W. A. NORTON,
Special Assistant to the Attorney General.

MARCH, 1914.





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IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

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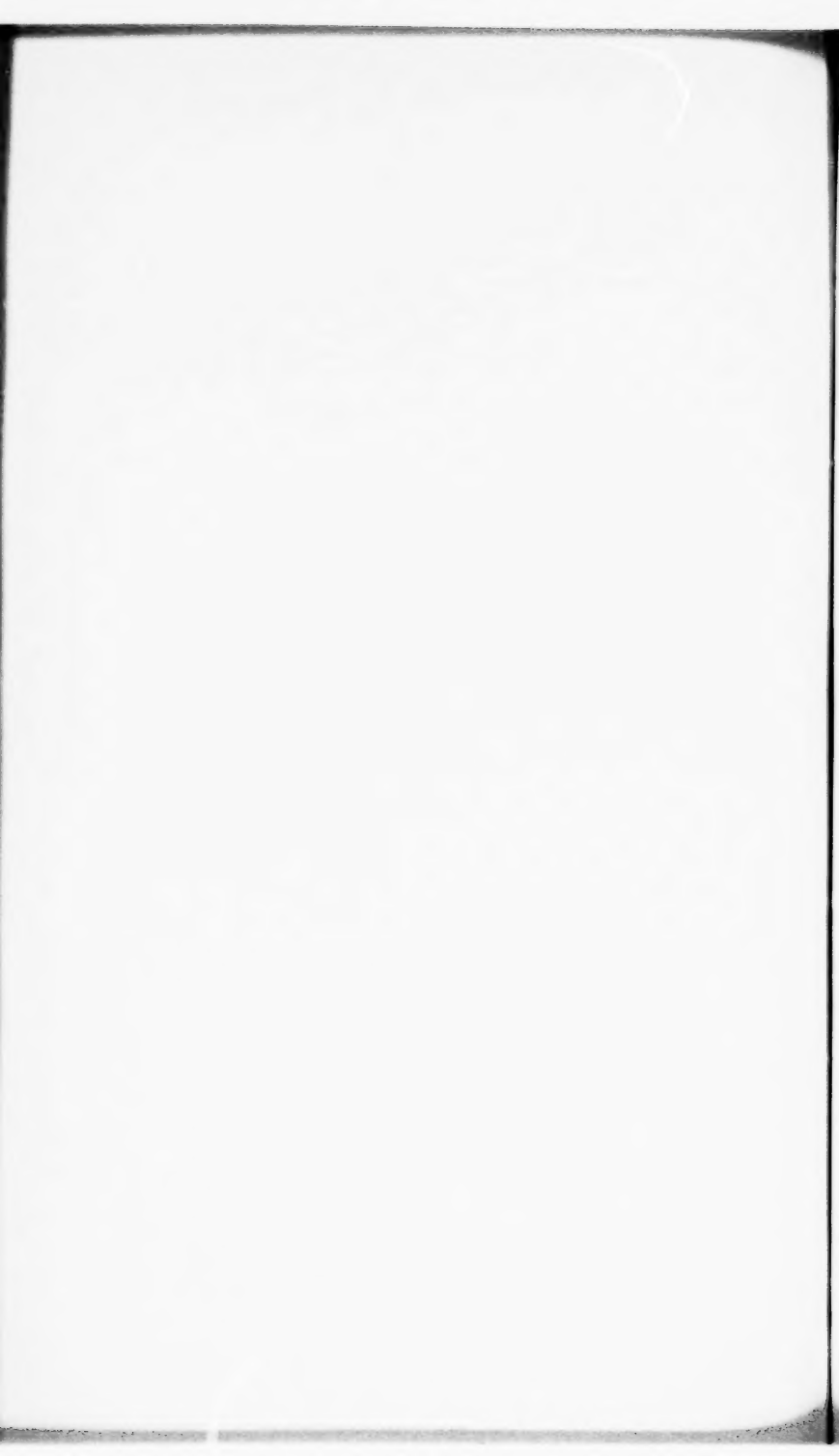
THE NICHOLS-CHISOLM LUMBER COMPANY, THE
MINNEAPOLIS TRUST COMPANY, AND HOVEY C.
CLARK.

APPEALS FROM THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR APPELLEES.

RANSOM J. POWELL,
Solicitor for the Respondents,
Minneapolis, Minn.

GEORGE T. SIMPSON,
ERNEST G. CARMAN,
Minneapolis, Minn., on the Brief.



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[24273]



IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

Nos. 873, 874, and 875.

THE UNITED STATES, APPELLANT,

vs.

THE FIRST NATIONAL BANK OF DETROIT,
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CLARK.

APPEALS FROM THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE EIGHTH CIRCUIT.

Introductory Statement.

The learned Solicitor General has explained to the court what these suits are about.

Were it not for the respect which we from the more remote regions of these United States are wont to accord to the

learned counsel representing the Department of Justice, I would be inclined to suspect that the historical statement of these cases, and what is claimed by the Government to be the mal-operation of the law under consideration, was designedly calculated to create prejudice, rather than to enlighten the court as to the issues involved at this time. But, to avoid casting any such reflection upon the Department of Justice, I shall proceed upon the assumption that this appeal is to be heard and disposed of upon the record before this court, and that the report of a sub-committee of Congress covering an investigation made in 1912 was introduced in this historical statement merely for the purpose of enabling this court to thereby, perhaps, obtain a glimpse of what was in the mind of Congress in 1906. At the same time, however, there are some omissions and inaccuracies of statement in the Government's brief which I feel should be supplied and corrected. In the first place these three cases, while representative in a sense of the mass of litigation instituted in Minnesota by the Department of Justice, are not to be taken as representative of all the cases *upon the facts*. The blood status of the allottees was stipulated in these three cases solely for the purpose of enabling the Department of Justice to obtain a ruling upon the construction of this so-called Clapp act, and the degrees were proposed by the attorney representing the Department. But it must not be understood from that that the other cases are pending on stipulations that the allottee has only a thirty-second or a sixteenth of other than Indian blood. The remaining cases depend upon the *proofs*, and the court can readily see that, with the character of the evidence which the defendants must depend upon to show the existence of foreign blood, the operation of the Clapp act is practically in the hands of the trial court. This will be more fully discussed in the argument.

The White Earth Reservation was established by the Treaty of March 19, 1867, between the United States and the

Chippewa Indians of the Mississippi, and comprises within its boundaries lands which had been previously ceded by the Indians to the United States, and lands which had been held by the Indians from time immemorial. It lies on the border land between the timber and prairie regions of northwestern Minnesota, something like one-half of it being open prairie and the other half being brush land and timber. On three sides of it the country is, and for many years has been, thickly settled with a representative farming population, while the lands on the other side are being rapidly occupied by farmers. To induce the Indians to adopt the habits and modes of life of the surrounding population, and with the further view of gathering, so far as possible, all of the Indians into two reservations, Congress passed an act on January 14, 1889, commonly known as the "Nelson act," wherein it was provided that a commission should be forthwith appointed to negotiate with the different bands of Chippewa Indians in Minnesota for the complete relinquishment and conveyance of all of their title in and to all of the reservations of such Indians in the State of Minnesota, except the White Earth and Red Lake Reservations, and to so much of these two reservations as in the judgment of the commissioners would not be required to cover the allotments provided for by that and other existing acts. The act further provided for the taking of a census of the various bands, and for the removal to the White Earth Reservation of all of the Chippewa Indians in the State of Minnesota, except those on the Red Lake Reservation, and directed the commissioner to allot the lands on the Red Lake Reservation to the Red Lake Indians, and to all the other Indians on the White Earth Reservation, in conformity with the act of February 8, 1887, commonly known as the "General Allotment act." Provision was also made for the sale of the relinquished lands, and the timber thereon, for the benefit of the Indians, and for aiding the Indians in becoming farmers. Under the authority of this act most of the Indians of Minnesota,

except those on the Red Lake Reservation, and those who took allotments in other localities, were removed to the White Earth Reservation and given allotments of eighty acres each.

On April 28, 1904, Congress passed a further act, commonly known as the "Steenerson act," securing to each Indian on the reservation one hundred and sixty acres of land. Under this act most of the Indians secured an additional allotment of eighty acres. Quite a number of them, however, had acquired one hundred and sixty acres of land by cultivation under the 7th article of the Treaty of 1867, herebefore mentioned, and obtained nothing under the Nelson or Steenerson acts.

The attempt to make farmers of these Indians was a notorious failure, and except in a few instances, where the lands were cultivated by white men having Indian wives, or by Indians who had learned agriculture by leaving the reservation and working for the adjoining farmers, the land lay idle and unused at the time of the passage of the acts hereinafter discussed, permitting sales of such lands under certain circumstances. The Chippewa Indian does not take to farming, and education does not change his natural characteristics in that respect. He is a good woodsman, and takes readily to mechanical pursuits, but the land in his hands was not productive. Most of the older Indians lived around the lakes in the woods, while the others either left the reservation or followed their bent or training in other pursuits. Many desired to sell their land or timber, or both, some of them wishing to leave the reservation entirely, others wishing to use the money to improve their homes, while others, doubtless, were simply actuated by a desire to get their land into money, without any very well defined idea of what they wanted to do with it. Death and descent had in many cases cast upon a single individual several hundred acres of land, which he could not or would not use. In view of this general situation, Congress saw fit to pass the act of June 21, 1906 (hereinafter referred to as the Clapp act), removing

the restrictions upon the transfer of lands upon this reservation. The problem presented at that time, however, was where to draw the line, and to what extent the restrictions should be removed. It was observed that while in many cases the pure bloods were as competent to care for themselves and families as those in whose veins there was an infusion of foreign blood, yet, on the whole, the infusion of foreign blood, mostly English, French and Scotch, had produced a type whose tendency was toward greater commercial activity, more self-reliance and resourcefulness, and larger capacity and efficiency in the affairs of life. Congress, by the act just referred to, therefore, drew the line between full-bloods and mixed-bloods, and removed all restrictions from allotments held by adult mixed-bloods, but left the full-bloods under restraint until they could establish their competency to the satisfaction of the Secretary of the Interior.

This act was a part of the Indian Appropriation act of 1906.

In the appropriation act of March 1, 1907, the provisions of the act of June 21, 1906, removing restrictions from allotments on the White Earth Reservation were re-enacted and extended. Following the passage of these acts a general commerce in the lands and timber on the White Earth Reservation sprang up. Many of the allottees sold all the land they had and left the country. Some mortgaged their property to secure means with which to improve their homes. Others sold or mortgaged their lands and squandered the proceeds. Farmers came and settled among the Indians, a county was organized out of sixteen townships of the reservation, while the other townships were incorporated into adjoining counties. Lands were put under cultivation, schools established, and a process of assimilation was inaugurated, which, in a few years, will completely amalgamate the white, Indian and mixed-blood populations of that locality. This condition progressed for about three years, when it was reported that some of the full-bloods had repre-

sented themselves to be mixed-bloods and had sold their lands without first establishing their competency before the Secretary of the Interior. Special agents were sent to investigate, who reported five or six hundred cases, as we recall it, in which, in their opinion, full-bloods and minors had been induced to sell or mortgage their lands. It was also reported that frauds had been committed, not only in inducing full-bloods to represent themselves as mixed-bloods, but also in inducing mixed-bloods to sell their property for less than its reasonable value. Upon this report the matter was turned over to the Department of Justice for investigation and action, with the result that between August, 1910, and the present time, over twelve hundred suits in equity have been filed by the Department to cancel conveyances of allotments on the White Earth Reservation, alleged by the United States to have been executed by the allottees without lawful authority.

Unquestionably there were frauds committed, and there was drunkenness and wasteful improvidence, but the report of the congressional sub-committee, from which counsel for the Government have quoted, shows that neither the frauds nor the drunkenness and improvidence were confined to those more Indian than white. The cases of Peter Blair and Charles Bottineau are cited as examples of the frauds committed, and both of these allottees are only half Indian, according to the Government printed rolls.

Undoubtedly there is poverty and distress among these Indians, but to attempt to ascribe that to the operation of the Clapp act is an insult to the intelligence of well-informed men. There is just as much poverty and distress among the other bands of Chippewa Indians, as to whom the Clapp act did not operate, and it is an historical fact, vividly exhibited in the reports of agents to the Government, and in the books of travellers among these Indians, that there has always been more or less poverty and distress among them since the United States, as a government, undertook to deal

with them and the white race has broken in upon their ancient customs and habits of life.

It is also unquestionably true that there was a demand, from the counties of which the reservation formed a part, that some plan be devised whereby the lands of the Indians, lying idle and unproductive and not subject to taxation, could be, in part at least, released, but the impression sought to be created by the extract from a letter of Mr. Steenerson, of Minnesota, to one of his constituents, a garbled extract of which is shown on page 15 of the Government's brief, is hardly fair and does this gentleman an injustice. It will be observed that he was not talking about an act removing restrictions arbitrarily from mixed bloods, but was discussing a proposed law to take the power of determining competency away from the Secretary of the Interior, so far as Minnesota was concerned, and resting it in the courts of that State. Mr. Steenerson was clearly in accord with the departmental theory that competency should alone be the ground upon which restrictions should be removed. The departure of Congress from his theory by the passage of the Clapp act, and other similar laws subsequently, is significant as tending to show, to some extent at least, an abandonment of the idea of absolute competency as the basis for the removal of restrictions. The following is his letter in full:

J. E. RICE, Esq.,

Mahnomen, Minn.

"MY DEAR SIR: I have your letter of the 5th instant, and have also received several letters from persons in that locality, all urging my support for the measure looking to the removal of restrictions on alienation of lands of mixed bloods and such full-blood Chippewas as may be capable of handling their own affairs.

"It seems to be the impression that I am opposed to this measure, or at least not favoring it as much as in my power. I have reason to believe that Mr. Birkett has been spreading this report, for I can easily

understand that he was a little dissatisfied with the action of the House in passing the Burke bill and nothing more.

"Now, I desire to explain to you exactly what the situation is with reference to these bills in this Congress. The House Committee on Indian Affairs are in harmony with the views of the Department upon this question of removing the restrictions, and the commissioner and the Secretary of the Interior both insist that they should not part with the power of granting or refusing this restriction in cases presented to them. For this reason the Burke bill was recommended by the House committee and passed, and this bill authorizes the Secretary of the Interior in any case that he deems proper to remove the restrictions; it is left entirely within the discretion of the Secretary of the Interior. Last year and the year before this was all that was asked by the towns adjoining the White Earth Reservation. Lately, however, a demand has come both from people living near the reservation that the power of removing or retaining the restrictions should be taken from the Interior Department and vested in the courts. Mr. Beaulieu and Mr. Birkett suggested that such a provision be attached to the Indian Appropriation bill, and I informed them that it could not be done, because the committee was opposed to it.

"In the first place, the House has a rule that no new legislation shall go on an appropriation bill, and the Senate has no such rule, and when new legislation is put on the appropriation bills in the Senate it may under the rules of the House remain, but it cannot originally be put on in the House. For this reason I made no further effort to secure a provision in the Indian appropriation bill, and for the further reason that Senator Clapp, who favored the idea of taking the power away from the Secretary of the Interior and giving it to the courts, said that he would propose such an amendment to the appropriation bill in the Senate. I understand he has secured such an amendment. Under the regular procedure, when the appropriation bill comes back to the House a motion will be made to nonconcur in the Senate amendments

and to ask for a conference. Thereupon the Speaker will appoint Mr. Sherman, the chairman of the House Committee on Indian Affairs; Mr. Curtis, the ranking member of the Republican side; and Mr. Stephens, of Texas, the ranking member on the Democratic side, as conferees, and these three men will meet with three Senators, including Senator Clapp, and they will discuss the question of whether the Senate amendments shall remain in the bill or not. Now, I want you to understand that you could no more pass a bill taking this power away from the Secretary in the present House of Representatives than you could fly. The Indian Affairs Committee is opposed to it, and the Department is naturally opposed to it, and you could not get such a measure on the calendar. So that the only possible way to get the House to consent to such a measure would be in the way that is now in progress; that is, by attaching it in the Senate to an appropriation bill and thereby bring it into conference.

"I have already spoken to the members of the Indian Affairs Committee and shall personally urge upon both Mr. Sherman and Mr. Curtis the advisability of agreeing to Senator Clapp's provision as applied in Minnesota, and that is all that can be done. With the President, the Secretary of the Interior, and the Commissioner of Indian Affairs opposed to this idea, you can easily see that it is not an easy matter. It affects the power of the Department, and all the departments are jealous of their power. I have been thus exposit in the matter for the reason that I wished you and the other people of Minnesota to understand the situation. I have reason to believe that Mr. Birkett, because I did not propose to waste time by introducing the original bill in the House, got the impression that I did not favor the measure. I told him that we had passed the Burke bill in the House and that was all that could be done, unless it went in on the appropriation bill and was, so to speak, forced upon the House, and that he would have to look to Senator Clapp for a carrying out of that plan.

"I hope you and the other people in that locality will understand exactly what the situation is, and that

if this proposition cannot become a law when it is attached as a Senate amendment to the appropriation bill, there is no possibility of getting it through any other way.

"I am, yours, very sincerely,

"HALVOR STEENKERSON."

Another quotation which may be misleading is the one from the speech of Senator Depew, found on page 16 of the Government's brief. The Senate had under consideration an amendment to the Indian Appropriation bill authorizing the Secretary of the Interior to cancel the allotments previously made to the members of the Jicarilla tribe of Indians in New Mexico. The debate was upon the point of order that the amendment was general legislation. The Clapp act was not under consideration and did not come up for two days. Senator Depew was criticising that method of legislating and used the Jicarilla amendment as an illustration. That was all.

Analysis of the Issues.

All of the bills filed are similar in tenor, and in substance allege, in each case, that the United States is the owner of the land in controversy, as a part of its public domain; that with a view to protecting and assisting certain Indians, known as the "Chippewa Tribe, or Nation," it set apart as a reservation from its public domain, and temporarily devoted to the use of the Indians, certain territory known as the "White Earth Reservation," without in any manner parting with its title in fee simple and control of the land; and that, while the Indian was permitted selections in severalty, in order to avoid the complexities arising from a communal possession and occupancy of said reservation, such allotment or selection amounted at law and in equity to no more than a license, without consideration, unattended by any incident or characteristic which would give the al-

lottee any rights, except to go in and upon said lands and occupy the same without waste during the pleasure of the United States. The bills further describe the allotments to the respective individuals, the issuance of that familiar instrument known as a "Trust Patent," and which has been before this court on several occasions heretofore; the execution of the conveyance or conveyances by the allottee, and the subsequent conveyances executed by the persons claiming under the allottee; and conclude, in all cases, except the timber cases, with the allegation that the lands are not occupied or improved, and are in the main open and vacant. In the timber cases the bills, in addition to the other allegations, ask for an accounting against the defendants for or on account of any timber removed from the land, and pray injunction from the interference of the defendants in the premises.

Briefly, then, the suits are brought upon the theory that the United States is the sole owner in fee simple absolute of the lands on the White Earth Reservation, of which the Indians are in the temporary possession by the grace of the United States, but without any right or interest therein, and the relief sought is a cancellation of conveyances alleged to have been executed by various Indians and their grantees.

In none of the cases at bar, and in fact, we may state, in no case filed up to the present time, has the United States alleged or suggested any fraud, undue influence, or insufficient consideration in the transactions sought to be canceled and set aside. In all of the cases the parties defendant are the last grantees of the land or timber, and the incumbrancer or incumbrancers, if any. Neither the Indian nor any of the intermediate grantees are made parties.

In the answers of the defendants in the cases at bar (and they may be taken as representative of the answers interposed in all of this litigation) the defendants deny the title of the United States; allege that the lands on the White Earth Reservation are the sole property of the Chippewa Indians located thereon, setting forth the fact that by the treaty of

March 19, 1867, the Chippewa Indians purchased so much of that reservation as they did not already own, and alleging that ever since that time these Indians have been in the exclusive use and enjoyment thereof. They admit the passage of various laws relating to taking up portions of the tribal property in severalty, but deny that the permission of the United States to take such allotments was an act of grace, or that the Indians surrendered any rights to the United States in doing so, and allege that the selection of allotments was a method of partition, by which each individual Indian acquired in severalty that interest which the tribes or bands had hitherto owned in common. The answers admit the allotments to the persons named, and the issuance of the so-called trust patent, and admit, in most cases, the execution of the instruments alleged in the bills to have been executed. The allegation that the conveyances constitute a cloud upon the complainant's title to the property in litigation is denied. The answers then set forth that the particular allottee, or the Indian, or Indians, who conveyed the premises originally, are mixed-blood Chippewa Indians under the acts of Congress heretofore referred to, and that they were thereby emancipated, and restrictions upon the sales of such lands removed. It is further set forth in the answers that the conveyances in each case were executed for a full and fair consideration, and that at the time of their execution the allottee, or the Indian conveying the property, represented and made oath to the fact that he, or they, were mixed-blood Chippewa Indians, and of the class mentioned in said several acts of Congress, and that the defendants in each case purchased in good faith, in reliance upon such representations, and without knowledge of the facts or means of readily ascertaining the same. It is further alleged that neither the allottee nor the complainant has offered or attempted in any manner to place the defendants *in statu quo*. In the timber cases the defendants deny the right of the United States to an accounting or to any relief under the bills filed.

To summarize, then, it will be seen that the answers raise the question of title and right to sue, the issue of fact as to the status of the Indian, and the equities in favor of the defendants.

Analysis of the Proofs.

To sustain the allegations in the bill the Government introduced in evidence a stipulation of facts, in which it was agreed that the land described in the bill was within the White Earth Reservation; that the person named in the bill as the allottee, selected the land, which selection was duly approved, and the so-called trust patent issued therefor, and that the conveyance or conveyances described in the bill were in fact executed. This form of stipulation of facts is the same in all of the cases, being varied only to meet the circumstances of each particular case, with regard to the number of conveyances of record. The Government also introduced a copy of the so-called trust patent, and rested its case on that evidence.

The defendant, in the first case, then introduced a stipulation of fact, which will be found on page 18 of the record, in which it was agreed that the allottee was an adult Chippewa Indian residing upon the White Earth Reservation, having some white blood, derived from a remote ancestor, the exact amount of which was undetermined, but that it did not exceed a one-thirty-second part; that the consideration was the full sum stated in the mortgage sought to be canceled; that at the time of the execution of such mortgage the allottee represented and made oath to the fact that she was a mixed-blood Chippewa Indian, and that the defendant made the loan and accepted the conveyance in reliance upon such representations, without knowledge or information as to the truth or falsity thereof, and without means of ascertaining the true facts with relation thereto; that the allottee had not returned the consideration, nor

offered to return the same, nor has the complainant offered in any manner to refund or secure the refundment of the consideration, or protect the defendant in any manner.

It was further stipulated that in response to a request of the Indian agent at Detroit, Michigan, in the year 1855, for a construction of the term "mixed blood," which was used in the 7th subdivision of the 2d article of the Treaty of La Pointe, made with the Chippewa Indians on September 30, 1854, the Commissioner of Indian Affairs construed the term to mean "all who are identified as having a mixture of Indian and white blood," and that the commissioner further ruled that the proportion of each blood was immaterial, where language as broad as that was used. Similar stipulations were introduced in behalf of the defendants in the second and third cases, which will be found on pages 144 and 179 of the record.

The defendant also introduced testimony of witnesses residing upon and around the White Earth Reservation, showing the general understanding of the community as to the construction and meaning of the term "mixed blood," in the acts of Congress hereinbefore referred to, by which it was shown that by inquiry at the agency office, and otherwise, the term was understood and construed to mean "any person who could be shown to have any admixture of Indian and foreign blood, regardless of the definite quantum of each."

In that connection the defendant also put in evidence a stipulation between counsel for the respective parties, touching the testimony of Simon Michelet, who was the Indian agent at White Earth for several years prior to the date of the passage of the act of June 21, 1906, and who continued as such agent until about the 1st day of June, 1908, and George A. Morrison, who was an old Indian trader, and had been associated with the Chippewa Indians intimately since 1858. Mr. Michelet testified in substance that soon after the passage of said act he went to Washington for consultation with the Indian Bureau regarding the construction of the

term "mixed blood," as used in that act, and that at that consultation it was agreed that the act did not require a showing of any definite quantum of foreign blood to constitute a mixed blood, but that the term included any adult allottee who could be shown to have a mixture of Chippewa and white blood. He further testified that, so far as his observation went, this was the construction generally adopted by those who dealt with the Indians on the White Earth Reservation. He also stated his observation in regard to the effect of the infusion of foreign blood in creating a type such as we have previously described.

Mr. Morrison's testimony was directed along the same lines, and particularly with regard to the effect of the admixture of foreign blood, and the impossibility of basing any presumption of competency upon the particular quantum of foreign blood in the mixture. These agreed statements will be found, commencing on page 80 of the record.

The defendant further put in evidence the deposition of C. F. Hauke, 2d Assistant Commissioner of Indian Affairs (Record, 62), who identified a letter which was produced and put in evidence, written on November 19, 1910, to Hon. E. H. Long, special assistant to the Attorney General, and Mr. J. H. Hinton, special Indian agent at Detroit, Minnesota (Record, page 71), in which the commissioner discussed the question with regard to the construction of the expressions "full bloods" and "mixed bloods," as used in the acts of June 21, 1906, and March 1, 1907, and stated that "the office is inclined to the view that the words and expressions are to be construed in their ordinary meaning." Mr. Hauke testified that this was not intended as a Department opinion, and that, so far as he knew, the commissioner himself had never officially construed the terms as used in those acts.

Mr. Valentine, the Commissioner of Indian Affairs at that time, testified that to his recollection his office had given no official construction of the term "mixed blood," as used in those acts, during the time when he was commissioner.

Mr. Allen, a veteran clerk in the Indian Bureau, testified that for a number of years after the passage of those acts the applications for fee-simple patents thereunder came under his supervision, and that during all of that period the applications were never required to show any particular quantum of foreign blood, but that the patents were issued upon a showing that the applicant was an adult mixed blood Chippewa Indian. He also stated that the construction of the term suggested in Mr. Hauke's letter was the view of the office, held at that time, without any exhaustive examination of the question.

The defendant also put in evidence, as Exhibit 4, a map of the reservation, showing the extent to which the lands of the Indians had been transferred, the purpose of which was to show the extent to which settlers have come among the Indians.

It was also shown that a roll of the Indians had been prepared in the fall of 1910, and approved on December 31, 1910, by the Secretary of the Interior, showing the percentage of Indian blood of each allottee on the roll, and this was introduced as Defendant's Exhibit 5, and by stipulation condensed to show certain particular Indians who had applied for fee-simple patents (Record, page 84).

Following that exhibit the defendant put in evidence applications for fee-simple patents of several Indians mentioned on that roll, and the recommendation of the Indian agent or special Indian agent and assistant to the Attorney General, relating thereto, by which it was made to appear that applications had been made for fee-simple patents (and approved by the special investigators and fee-simple patents issued by the Department in a number of cases to the applicants) by persons who were shown on the roll (Exhibit 5) to have had one-thirty-second only of foreign blood.

In rebuttal the Government put in evidence applications in other cases wherein it was shown that the special investigators had declined to recommend fee-simple patents on the

ground that the blood status of the applicant was doubtful, in a number of cases, shown by the aforesaid roll to have one-half or less of Indian blood.

All of this evidence touching the construction of the acts of Congress of June 21, 1906, and March 1, 1907, was made applicable to the second and third cases of the record, and the principal difference between the three cases, upon the facts as presented here, relates to the quantum of foreign blood in the allottees in each case.

It was agreed in the first case that the allottee was not a pure blood, but had some white blood, the amount of which was undetermined, but that it did not exceed one-thirty-second part. In the second case it was unequivocally agreed that the allottee had a one-sixteenth of white blood, and in the third case it was unequivocally agreed that the allottee had one-eighth of white blood.

There is one other difference, to which we should call the court's attention here: In the second and third cases the defendants obtained their conveyances from the intermediate grantees of the allottee, who have not been made parties. This, in substance, covers the proofs upon which these cases were presented to the court.

The trial court construed the acts above described, and held that the term "mixed blood" should not be given its broad general meaning, and drew the line at one-eighth—holding that the eighth blood was a mixed blood, but that the other two were not mixed bloods, and gave judgment accordingly.

Upon appeals by both parties to the Circuit Court of Appeals it was held that the term "mixed blood" in the Clapp act included all allottees who had an identifiable mixture of Indian and other blood, and, since the presence of white blood in the veins of the allottees in all three of the cases had been agreed upon as a fact, the result was a dismissal of the bills in the three cases upon the merits.

Statement of the Defenses.

The issues are clear cut and well defined. The United States sues as sole proprietor of lands which it claims to own in fee simple. *Omitting any allegation, reference or suggestion of fraud*, and standing squarely upon its technical right as a proprietor, it alleges that certain Indian licensees have mistaken their rights and attempted to convey the property, of which they were temporarily, and by the grace of the complainant, permitted a fleeting occupancy. The allotments and trust patents by which these Indians were invested with that fleeting privilege are alleged and the conveyances sought to be cancelled are designated.

In general terms the defenses in the Court of Appeals were as follows:

1st. That the title to this reservation is not wholly in the United States, as set forth in the bills, but is in the Indians themselves, there being nothing in the United States except the bare legal title. The entire beneficial ownership and enjoyment of the property is in the Indians, subject to such control over them as Congress may properly impose.

2d. That if the theory of the Government is correct, and the lands are the lands of the United States, the suits cannot be maintained for the reason that the conveyances are not clouds on the Government's title. No person can cloud the title of the United States by executing a conveyance of its lands, in which he obviously has no right or equity.

3d. If the bare legal title is in the United States, and the full beneficial ownership is in the allottees, the Government is then suing for the benefit of private persons, and whether it be deemed the guardian of the Indians, or merely enforcing a governmental policy, it is subject to all the maxims and principles of equity applicable in a similar suit between private persons.

4th. That the defendants, having acted in good faith, and being induced to do so by reason of the acts of Congress, and

the acquiescence, if not active representations, of the representatives of the Government, together with the representations of the Indians, are entitled to hold the land as against this attack, unless the United States, as complainant, shall do equity by placing the defendants in *statu quo*.

5th. That the Indian grantors in each case are mixed-blood Indians, within the purview of the acts of Congress removing restrictions.

6th. That the United States is not entitled to a decree against a last grantee of the property, where the prior grantors are not made parties; all grantors, including the Indian, as well as the last grantee, should be made parties.

Since the Court of Appeals disposed of the cases by sustaining our fifth proposition, above stated, the attack of the Government is directed to that point. But, on the familiar principle that, if the judgment of the lower court is right, it will be sustained, although the judges may have given an erroneous reason for their decision, we must still maintain the propositions we contended for in support of our defense. We shall reverse the order, however, and first meet the attack of the Government on the lower court's construction of the Clapp act. Our other propositions will not be argued, but we do not wish to be understood to have waived or abandoned any defense.

Synopsis of the Argument.

I.

Analysis of the Government's Propositions and Its Fallacies.

II.

The Respondents' Case.

1. The Clapp act. It was obviously designed to create an arbitrary classification.

(a) The language is clear and explicit, and the term "mixed blood" had acquired a definite and well-understood meaning.

Indian treaties:

Kappler, Indian Laws and Treaties, vol. II, pp. 147, 148, 173, 175, 207, 211, 218, 223, 269, 298, 301, 307, 338, 452, 464, 474, 492, 493, 499, 543, 568, 575, 649, 689, 692, 766, 774, 779, 798, 802, 841, 855, 862, 864, 881, 959, and 975.

Debates in Congress, Cong. Record, vol. 40, pp. 1260 *et seq.*, 5738, 5739, 5784, 6041, 6044, 6046; vol. 41, p. 2337.

Definitions and use in decided cases:

Standard Dictionary.

Century Dictionary.

Encyclopedia Britannica, vol. 14, p. 467.

Hand Book of American Indians, by Frederick Webb Hodge, Government Printing Office, 1907, pp. 365, 850, and 913.

Words and Phrases, vol. 5, p. 4546.

27 Cyc., 811.

Hamilton vs. Ry. Co., 21 Mo. App., 152.

- Daniel vs. Clay*, 19 Ark., 121.
Thurman vs. State, 18 Ala., 276.
Johnson vs. Norwich, 29 Conn., 407.
Van Camp vs. Board of Education, 9 Ohio St., 407.
Gentry vs. McMannis, 3 Dana (Ky.), 382.
Scott vs. Rauh, 88 Va., 721, 727.
Jones vs. Commonwealth, 80 Va., 538.
North Carolina Statutes, sec. 5, ch. 71, and sec. 81, ch. 81, of Act of 1836.
State vs. Dempsey, 31 N. C. (9 Ired.), 384.
State vs. Chavers, 50 N. C., 11.
Hopkins vs. Rowers, 111 N. C., 175.
State vs. Davis, 2 Bailey (S. C.), 558.
Thacker vs. Hawk, 11 Ohio, 377.

(b) The tendency at that time was toward the removal of restrictions by arbitrary act of Congress.

- Annual Report of Indian Commissioner for 1905*,
 Sept. 30, 1905, pp. 3, 6, and 7.
Act of May 27, 1908 (35 Stat., 312), its history and
 the debate thereon, Cong. Record, vol. 42, pp. 5074,
 5076, 5077, 5078, 5425.

(c) If competency was the controlling element of the classification in the Clapp act, there was no excuse for its passage. All cases of competency were provided for by the Burke act.

- Act of May 8, 1906*, 34 Stat., 182.

(d) The interpretation of the term "mixed blood" necessitates the interpretation of the term "full blood." Congress made two classes, not three.

2. In seeking the intent of the legislature the first consideration is the natural, ordinary, and generally understood meaning of the terms used.

- United States vs. Fisher*, 2 Cranch, 358.
- Lake County vs. Rolling*, 130 U. S., 662.
- Sloan vs. United States*, 118 Fed., 285.
- United States vs. Temple*, 105 U. S., 97.
- Maillard vs. Lawrence*, 16 How. (57 U. S.), 250.
- United States vs. Pacific Ry. Co.*, 91 U. S., 72.
- Parsons vs. Hunter*, 2 Sumn. (U. S.), 422.
- Levy vs. McCuttee*, 6 Pet. (U. S.), 102, 110.
- United States vs. Goldenberg*, 168 U. S., 95, 102.
- The Cherokee Tobacco*, 11 Wall., 616.
- Edison, etc., Co. vs. U. S. Elect. Co.*, 35 Fed., 138.

3. A dispute over the meaning of a statute does not of itself show an ambiguity in the act.

- Northern Pacific Ry. Co. vs. Sanders*, 47 Fed., 610.
- Shreve vs. Cheekman*, 69 Fed., 789.
- Webber vs. St. Paul City Ry. Co.*, 97 Fed., 140.
- Swartz vs. Siegel*, 117 Fed., 13.

4. Subsequent experience is no guide to interpretation.

- United States vs. Union Pacific Ry. Co.*, 91 U. S., 72.
- Platt vs. Union Pacific Ry. Co.*, 99 U. S., 48.

5. Where Congress has by apt terms created a class or drawn distinctions between classes of persons or objects it is not competent for the courts, under the guise of interpretation, to extend or limit the operation of the statute.

- United States vs. Colorado, etc., Co.*, 157 Fed., 321;
85 C. C. A. (8th Circuit), 27.
- Brun vs. Mann*, 151 Fed., 145; 80 C. C. A. (8th Circuit), 513.
- United States vs. Temple*, 105 U. S., 97.
- Minor vs. Bank*, 1 Pet. (26 U. S.), 44.

Folsom vs. United States, 160 U. S., 121.
United States vs. Choctaw Nation, 179 U. S., 494.
Pirie vs. Chicago, 182 U. S., 438, 451.
The Paulina vs. United States, 7 Cranch, 52, 61.
Bavintz vs. Casey, 7 Cranch, 456, 468.
United States vs. Goldenberg, 168 U. S., 95, 102.
Marwell vs. Moore, 63 U. S., 185, 191.
Tiger vs. Western Inv. Co., 221 U. S., 286.
Thurman vs. State, 18 Ala., 276.

6. The court is not at liberty to amend the statute or read words into it to make it conform to what the court may believe to be the spirit of the act or to escape injustice of the law.

Marwell vs. Moore, 63 U. S. (22 How.), 185.
United States vs. Goldenberg, 168 U. S., 95.
Hobbs vs. McLean, 117 U. S., 567.
In re Conway and Gibbons, 17 Wis., 526.
In Op. Atty Gen., 65.
St. Louis, etc., Co. vs. Taylor, 210 U. S., 281.
Hadden vs. Barney, 5 Wall., 107.
Gardner vs. Collins, 2 Pet., 92.

7. The practical construction by the departments of the Government and the dealings of the citizens with the subject in reliance upon that construction is entitled to consideration in cases of doubt.

United States vs. Union Pac. Ry. Co., 37 Fed., 551, 555 (148 U. S., 562).
Le Marchal vs. Teggarden, 175 Fed., 682 (C. C. A., 5th Circuit).
Pennoyer vs. McConaughy, 140 U. S., 1.
Maloney vs. Maher, 1 Mich., 26.
Westbrook vs. Miller, 56 Mich., 148.
United States vs. Alabama Ry. Co., 142 U. S., 615.
Kelly vs. Multnomah County, 18 Ore., 356.

- Schell vs. Fauche*, 138 U. S., 562.
United States vs. Moore, 95 U. S., 760, 763.
Johnson vs. Rallow, 23 Mich., 378.
Kirkman vs. McLaughrey, 160 Fed., 430.
United States vs. Bank of N. C., 6 Pet. (31 U. S.), 29.
2 Op. Atty Gen., 558.
In re State Lands, 18 Colo., 359.
Hill vs. United States, 120 U. S., 169, 182.
Blachum vs. Light Co., 36 Fla., 519.
Harrison vs. Commonwealth, 83 Ky., 162.
State vs. Holliday, 42 L. R. A. (Ind.), 826.
State of Iowa vs. Carr, 191 Fed., 257 (where authors discuss are collected and reviewed).
Hickman vs. United States, 224 U. S., 413.
United States vs. Chandler-Dunbar Co., 152 Fed., 25.
United States vs. Walker, 139 Fed., 409.
Railway Co. vs. West Division, etc., 26 Minn., 31.
Menard vs. Massey, 49 U. S., 292.
Mugge vs. Hallett, 22 Ala., 699, 718.

8. Congress was familiar with apt terms to create a classification based upon a given quantum of Indian and other than Indian blood. If it had intended to make the classification urged by the Government, it could easily have said as:

- Indian Treaties* (previously cited).
Act of May 27, 1908 (35 Stat., 312).
Pennock vs. Com'rs, 103 U. S., 44.
Smith vs. Bonifer, 154 Fed., 883.
Farrington vs. Tennessee, 95 U. S., 679, 689.
Bank vs. Mathews, 98 U. S., 621, 627.
United States vs. Koch, 40 Fed., 250, 252.
In re Drake, 114 Fed., 229, 232.
Moore vs. U. S. Trans. Co., 65 U. S., 1, 32.
Shaw vs. Railroad Co., 101 U. S., 557, 565.
Harrington vs. Herrick, 64 Fed., 469, 471.
Austin vs. United States, 155 U. S., 417.

- In re Davidson*, 54 Wal., 470, 474.
Op. App. Opn., 418.
Franklin, Towns Co. vs. Chapman, 78 Wal., 720.
Duck vs. United States, 22 Ct. Cl., 164.
Duck vs. Collector of Customs, 70 Wal., 319.
Stodd vs. Stafford Auctions, 1 Brock. (1 S.), 162.
Rain vs. Carter, 98 1 S., 88.
Rampbold vs. Little Rock, 125 1 S., 127.
United States vs. Rader, 110 1 S., 780.
Lawrence vs. United States, 92 1 S., 744.
Rail vs. Mercantile & Wall, 380.
Tanner vs. Whitcomb, 10 Wall., 161.
United States vs. Anderson, 9 Wall., 60.
Lawrence vs. Allen & How, 700.
Wentworth, Dan. R. Co. vs. Dudley, 85 Wal., 80.
In re Baker, 90 Wal., 95.
In re Bauman, 90 Wal., 948.
Steel vs. Rail, 110 Wal., 970.
United States vs. Clarendon, 113 Wal., 525.
Leah vs. Rivers, 20 Wal., 409.
Thomas vs. Meyer, 10 Wal., 343.
Hall vs. Case, 17 Ct. Cl., 46.
The Chemical Tobacco, 1 Wall., 816.
Hammer vs. Collins, 2 Wal. (1 S.), 87.

ARGUMENT

I.

Analysis of the Government's Propositions and Its Fallacies

The principal argument on behalf of the Government in these cases is a recital of alleged facts and circumstances, including letters written by various persons not connected with this litigation, and a quotation from the report of a subcommittee of Congress, all designed to show that the act removing restrictions from mixed-bloods on the White Earth Reservation was probably secured through improper influences, had worked badly, and ought to be repealed.

We know of no orderly method of meeting argument of this character, and must assume that it carries no weight in this court. *Upon the record*, no such mal-operation of the statute is apparent. No fraud, overreaching, or insufficiency of the consideration paid to the allottees is alleged in the bills, and nothing of the kind was proved or offered to be proved. On the contrary, it was agreed by counsel for the Government that the consideration paid to the allottee in each case was the full and fair consideration for the property conveyed (Record, pages 18, 145, and 179). If the occasion for the remarkable departure from well-settled principles of statutory construction, contended for by the Government, exists in these cases, it must be sought elsewhere; it cannot be found in the record, or obtained from reliable sources.

Logically following the argument (?) sought to be drawn from their historical statement, counsel for the Government ask this court to partially repeal the Clapp act, by limiting its operation to those allottees who are half or more white.

It is interesting to note the progress of this dissension. In

the trial court the degrees of blood agreed to in these three cases were proposed by counsel representing the Government, and the case was argued and submitted on the expectation (plainly deducible from their argument) that the court would be led to draw a line somewhere between a thirty-second and an eighth. Nothing was said in that court on the part of the Government that the act meant *only* those half or more white. Both parties appealed to the Circuit Court of Appeals, and there, for the first time in court, it was suggested that the act did not operate on any one less than half white and even then the learned counsel arguing the case for the Government expressed his personal view that the law should be drawn at one-quarter or more white, and the Government did not argue otherwise. Now we are told by the *sympathetic* assertion that the act was meant to apply only to those having half or more white blood.

It is contended by the Government that the literal definition of the term "miscegenation" includes any person having in his veins the blood of two or more races, no matter in what proportion. It is contended that for special reasons, Congress *ought not* have intended to use the term in that sense in this act. We are charged with absurdity because we have contended that probably shall contend that Congress enacted a purely arbitrary distinction. And yet how is the distinction any the less arbitrary if the construction contended for by the Government is given to this statute? Is not an act removing restrictions from those who are half or more white, as pure as arbitrary as one operating on those who are *three-quarters* or more, or *one-eighth* or more, white, or operating upon those who can be shown to have a mixture?

But it is contended that Congress has uniformly made complete the restriction removing restriction, and that therefore this act must be deemed to be of the same character; and that the class intended to be affected by it is that which

may be reasonably presumed to include the competent allottees only.

As a syllogism it would be something like this:

Major premise: Congress intended the term mixed-blood to apply only to those who may be conclusively presumed to be competent to handle their own business.

Minor premise: No person can be so presumed to be competent to handle his own business who is less than half white.

Therefore, Congress meant to draw the line at half-bloods.

We deny both premises. No presumption of competency whatever can be drawn from the mere *fact* of the infusion of white blood. It is the education, experience and environment which determines competency. This contention on the part of the Government ignores the evidence, not only of the record, but of common sense and experience. The infusion of white blood may, and undoubtedly does, create a type; a type more susceptible to civilizing influences, more capable of adapting itself to the changed conditions of life; but experience, as well as the record, furnishes us with sufficient evidence that this adaptability is in no wise proportionate to the amount of white blood the particular individual may have.

It is contended that it is absurd to assume that Congress meant to include in the same class intelligent and well-educated allottees, with but little Indian blood, with Ne-hin-ay-ge-shig, referred to as "ignorant, illiterate, incapable" (Gov't Brief, page 32). But the evidence shows that this same Indian, with only one-sixteenth of white blood, was passed by the special representatives of the Indian Bureau and the Department of Justice as entitled to a fee patent as an adult mixed-blood on August 20, 1910 (Record, page 90), which was the month in which this same representative of the Department of Justice commenced filing these suits. And she must have satisfied them of her competency also, in spite of the fact that she cannot write, since they denied such applications, on the ground that the blood status of the

allottee was doubtful, even in the case of an allottee who was half white, where, by reason of blindness, they thought he should remain under the Government's care (Record, page 110).

The absurdity of our interpretation and understanding of the act was not so apparent to the Government in 1910, evidently, as it seems to be now.

Has this court any information touching the knowledge of Congress regarding the experience and adaptability of the "White Earth mixed-bloods"? Since the special representatives of the Government on the ground found allottees with only one-sixteenth and one thirty-second of white blood to whom they recommended that fee patents issue, as adult mixed-bloods, and at the same time found others half or more white whom they reported as doubtful bloods, because they were incompetent (see Record, pages 84 to 102, and 106 to 115), we may fairly conclude that, generally speaking, the Government's assumption that there were more incompetents among these mixed-bloods who are more white than Indian, than among those more Indian than white, is not borne out by the facts.

Is our contention that the term should be applied to every allottee who can be shown, *to the satisfaction of the trial court*, to have some white blood any more absurd than the contention of the Government that competency was intended to be the real test, in the face of the fact that the two instances of fraud cited in the Graham report and quoted by the Government (pages 18 and 19) disclose allottees who are half white and as incompetent as one could find; and in the face of the further fact that many of those who were half or more white must have been, through natural cause—age, infirmity, inexperience, mental weakness, or disease—fully as incompetent as any pure-blooded old savage you ever saw?

To be logical the Government should have claimed that it was not the intention of Congress to draw the line at any

definite quantum, and then have asked this court to read the word "competent" into the statute; for really that is the Government's contention.

Nor is there anything sensible in the Government's contention that it is absurd to suppose that Congress expected by this act to emancipate the lands of allottees whose only modicum of foreign blood came from a white or negro ancestor, living and begetting children about the time of the landing of the Pilgrims. Of course, Congress never expected anything of that sort. In the first place, Congress was legislating with a knowledge of Indian history and Indian customs, and any one who knows anything about Indian history, or Indian customs of later years, knows it is difficult enough to trace their ancestry in the present tense, let alone the perfect and pluperfect. They kept no records and plurality of wives was common. So, also, plurality of wives was sometimes accompanied by an exchange or temporary shifting about of husbands. Add to this the indiscriminate familiarity of the French, English and Scotch fur traders, and their sons, and you have a situation in which the tracing of blood to such small fractional degrees is practically impossible. In the next place, the court must not be misled by the stipulation that one of these allottees had not to exceed a thirty-second of white blood. That was done to present the question, but when it comes to *proving* such facts the trial court will undoubtedly limit the operation of the act, by refusing to find as a fact that the allottee has any white blood, where he looks and acts like an Indian, and the only evidence on the part of his grantee is the tradition of some old Indian that away back there somewhere, four or five generations ago, one of his ancestors was not an Indian.

Congress knew, just as the Government has pointed out (Government brief, page 36), that, while there was some mixture as early as 1817, the bulk of the mixture has come much later than that, and the crossing back and forth in

this small tribe has eliminated all such infinitesimal fractions as the Government uses.

We shall contend, therefore, that the terms of the statute were advisedly used to describe two classes, the one to comprise all who can be proven to have a mixture of Indian and foreign blood, denominated "mixed-bloods," and the other to comprise all the rest of the allottees.

The point is made on behalf of the Government that, since the Indians are affected by this act, it should be construed as they would understand it, because of the principle established by *Jones vs. Meehan*, 175 U. S., 1. And that, from the uncontradicted testimony of three old Indians, their people drew the line at the half-blood.

There are three complete answers to this proposition. While it is true that a treaty, being a contract, will be construed as the Indians will understand it, and, likewise, a law, like the act of January 14, 1889 (Nelson act), which required the assent of the Indians, and so became, in effect, a treaty, will be so construed, it does not follow that a general law in which not only the Indians, but other citizens and the State as well, are interested will be construed according to the crude notions of the Indians. There is no authority for that proposition, nor reason in it, either. But if it were the controlling factor in a case like this, the opinions of the *Indians affected* would be the only ones entitled to consideration, and the Indians affected have not yet spoken in this case. The old Indians whose statements are found in the record and reproduced in the Government's brief, are *all full bloods* according to the Government roll, which was identified and a condensed portion of it printed, commencing on page 84 of the record. A law designed to remove restrictions from mixed-bloods should be construed as the *mixed-bloods* understood it.

A further reason why this point is without merit lies in the obvious fact that the old Indians classified their people according to their mode of life, and not according to blood.

II.

The Respondents' Case.

1. The act under consideration has been set out in full in the Government's brief (page 2) and need not be reproduced here. The attention of the court has also been called to the fact that it was passed twice, and Senator Clapp's explanation of it when he offered it the second time is printed in the Government's brief on page 29.

Our contention all the way through this litigation is and has been that the Clapp act was clearly designed to remove the restrictions from the lands of the class called "mixed bloods" by legislative enactment, without regard to whether the individuals of that class of allottees were all competent or not, thereby removing that class from the discretionary authority of the Secretary of the Interior, vested in him as to other allottees by the act of May 8, 1906 (commonly known as the Burke act). Further, that the class so designated was intended to be limited only by the proofs, and that the terms used cannot be modified, limited or extended by the court without invading the province of the legislature.

It has been held repeatedly that the question as to when and where and how and to what extent the restraints imposed upon the alienation of Indian lands shall be removed is wholly one for the determination of Congress.

Tiger vs. Western Inv. Co., 221 U. S., 286.

If Congress sees fit to retain such restraints perpetually the courts cannot emancipate the land from such restraints. If Congress should conclude to remove all restraints hitherto imposed upon the alienation of Indian lands it is its special province to do so, whatever the effect of such legislation may be. And in this case it saw fit to remove the restraints, arbitrarily and in general terms, from a class of allottees described by a general term, deliberately and advisedly selected,

as we believe, for if it had been intended to draw the line at any particular point, simpler and more easily applied terms were at the command of Congress and in daily use. If the court deems this term too broad it is not the province of the court to assist in the legislation by limiting its operation.

(a) The language used is clear and explicit. The term "mixed-blood" had acquired a definite and well-understood meaning. It is both interesting and instructive to trace the growth of the term in the Indian treaties. In our earlier treaties, and in fact as late as 1847, we find the terms employed either "half-blood," or "half-breed," with the occasional use of "quarter-blood." This is doubtless due to the fact that at that time the individuals of the intermingling races were all either half-bloods or quarter-bloods. But another generation or two produced an extended and indiscriminate intermingling to which no other term than "mixed" would apply. During that period it is also true that it was common practice to use the term "half-breed" to designate an individual of the intermingled races, regardless of the extent or proportions of the mixture.

We have cited the pages of Vol. II of *Kappler's Indian Laws and Treaties* on which the various terms appear, in order that the terms may be traced, but we will only refer to a few instances. On pages 147 and 148 men are called "half-bloods." In the Chippewa treaty of 1826, page 269, they are called "half-breeds," and "Chippewas by descent." In an Ottawa treaty, page 338, "half-bloods" are spoken of. In the Menominee treaty of 1836, page 464, we find the terms "mixed-blood" and "half-breed" used interchangeably. In the Chippewa treaty of 1847, page 543, for the first time a distinction is drawn between "full-bloods" and "mixed-bloods," and the mixed-bloods are declared to be Indians, thus recognizing a mixed-blood population. "Mixed-bloods" are provided for in the treaty of La Pointe, 1854, page 649; Treaty of Washington, 1855, page 689;

Treaty with the Winnebagos, 1855, page 692; Treaty with Yankton Sioux, 1858, page 779; and in the treaty with the Sauks and Foxes, 1859, page 798, the terms used are "whole-bloods," "half-bloods" and "mixed-bloods." That the meaning of the term was well understood is clearly shown by the letter of the Indian Commissioner to the Indian Agent at Detroit, Michigan (Record, pages 19 and 20).

To show that Congress was familiar with the use and application of the term one has only to follow through the *Congressional Record* the history of legislation relating to the removal of restrictions, beginning in the fall of the year 1905, and continuing to the spring of the year 1908.

Thus the act of April 26, 1906 (34 Stat., 144), relates to the final disposition of the affairs of the Five Civilized Tribes. Section 19 of this act, as the bill was reported to the House, provided for the removal of "all the restrictions upon the alienation of lands of Indian allottees of the Choctaw, Chickasaw, Cherokee, Creek and Seminole tribes, except Indians of full blood and except minors" (and excepting homesteads), and it further provided, "for the purposes of this section, the quantum of Indian blood possessed by any member of said tribes shall be determined by the rolls of citizens of said tribes, approved by the Secretary of the Interior." The bill was debated and passed the House in that form (*Cong. Rec.*, Vol. 40, page 1260 *et seq.*). In the Senate it was amended, but not in the essential particulars above quoted; and it passed the Senate. In the Senate this section was debated, and constant reference was made to the full-bloods and mixed-bloods of those tribes. The rolls of citizens therein referred to had been in process of preparation for a number of years, and the Senate, doubtless, was familiar with them. Trouble developed between the two Houses, and section 19 was changed to the form in which it appears in the act above cited (34 Stat., 144).

In the debates on the Indian appropriation act, 1906,

these terms were constantly used, especially as applied to the Five Civilized Tribes. We have referred to the rolls of citizens of the Five Civilized Tribes. These rolls had been in process of preparation for over six years at that time, and previous legislation regarding the Indian Territory is full of references to them. This Indian appropriation act of June 21, 1906, provided for closing those rolls and for printing and filing them. They were finished, compiled, and printed, and now exist as a Government record. In compiling this roll those Indians who could not be shown to have any white blood were put down as "full," and all others were given their percentage of Indian blood. When the Government quotes Senator McCumber, on page 28 of its brief, and seeks to give the impression that when the Senate was discussing the mixed-bloods in the Five Civilized Tribes they were talking about persons more than half white, the court is apt to be misled. Senator McCumber may not have been familiar with these rolls, and he may have been talking about averages, but the Senate generally must have been familiar with them, and they must have known, what the rolls themselves show, that on page after page throughout these rolls appear the names of mixed-blood allottees, aggregating hundreds, yes, thousands, of people, who were shown therein to be less than half white. And yet the Senate was constantly referring to those people as "full-bloods" and "mixed-bloods," and passing bills making these rolls the basis of classification (See act of April 26, 1906, sec. 19, 34 Stat., 144).

It is true that the number of those who were more than half white far exceeded the number of those mixed-bloods, less than half white, but they never spoke of those who were shown to have some foreign blood (but less than half) as "full-bloods." Let us take a short, personally-conducted tour through the *Congressional Record*.

In the debate on this Indian appropriation bill (*Cong. Rec.*, vol. 40, page 5738), an amendment was under con-

sideration removing restrictions from several members of the Cherokee nation by name. Senator Lodge objected that they had already applied to have their restrictions removed under the act of April 21, 1904, and the Department had granted the request of some of them, and that as to them no legislation was necessary. Then it was that Senator Clapp said:

"Mr. CLAPP: All I know about it is this, Senator: These people wrote up here—the Senator from Wyoming (Mr. Clark) had this matter in charge—and they asked to have these restrictions removed; and certainly I can see no objection to the removal of restrictions in respect of that class of people."

Senator Lodge then called attention to the fact that several of the persons on the list were reported to be full-bloods.

Mr. Foraker then asked to have the names of two others added to the list, and said:

"I understand that these are members of the Creek tribe, and only about half-bloods, perhaps not of that much Indian blood" (Record, vol. 40, page 5739).

The *Congressional Record* shows that the act now before the court came up for consideration the next day (*Cong. Record*, vol. 40, page 5784).

In the debate upon a proposed amendment to this Indian appropriation bill, Senator Teller, of Colorado, who was a member of the Senate Committee on Indian Affairs, clearly voiced the idea which probably actuated Congress in enacting the Clapp amendment. He said:

"Mr. President, I sympathize with every effort to help those who are down. I have learned what I think we have all learned by observation, by experience, by history, that after all the way to make men men is to compel them to discharge the duties of manhood, to take them out of leading strings, to put them upon their own mettle, as the saying is" (*Cong. Record*, vol. 40, page 6041).

The following amendment was offered to this Indian appropriation bill:

"That all restrictions upon the alienation of lands of Indian allottees of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes, excepting as to homestead, are hereby removed, to take effect July 1, 1906" (*Cong. Record*, vol. 40, page 6044).

The debate upon it shows that the Senate was perfectly familiar with the terms "full-blood" and "mixed-blood."

Mr. Spooner opposed it as general legislation, and for want of information.

Mr. Clark, of Wyoming, stated that such a clause had been passed by the House in the Five Civilized Tribes bill, and adopted by the Senate in substantially the same form, but subsequently stricken out in conference.

Mr. Teller, in the course of his remarks, on page 6046, said:

"I think myself the wisest thing we can do is to give, at least to the mixed-bloods, the right to alienate. I do not mean to say they are qualified, but the large percentage would be qualified, and the few who would not be must suffer rather than that the great mass of these people should be kept in a bondage that prevents them from progressing, and retards the progress of the community in which they live."

Senator Dubois, of Idaho, pointed out that, of the Indians in the Indian Territory, only about a quarter were full-bloods, and referred to the others as mixed-bloods. He opposed the removal of restrictions by arbitrary act because some of the mixed-bloods even were not competent (*Cong. Record*, vol. 40, page 6046).

Senator Money, of Mississippi, proposed a substitute for the amendment, removing the restrictions from the mixed-bloods only, and said, in support of it, that such an amend-

ment ought to meet the views of all parties; that it protected the full-bloods, and at the same time ought to content those who thought that all restrictions ought to be removed. He classified the allottees as full-bloods, mixed-bloods, and white men, evidently applying the latter term either to those who had only a slight proportion of Indian blood, or to the intermarried whites.

The Senate having temporarily laid aside the amendment under discussion and taken up for consideration an amendment arbitrarily removing restrictions upon alienation of an allotment held by a Creek Indian, Senator Tillman objected that the allottee appeared to be a full-blood and the amendment seemed to make an exception to the general rule in the proposed amendment before the Senate removing restrictions from all but the full-bloods.

Senator Long replied that if the amendment removing restrictions was adopted it would operate to remove them from this Indian.

"Mr. TILLMAN: Is he a white Indian?"

"Mr. LONG: No; a mixed-blood."

The quotations from the *Congressional Record*, on pages 26, 27, and 28 of the Government brief, exhibit a part of this debate. The proposed amendment had been amended to read as follows:

"That all restrictions upon the alienation of lands of Indian allottees of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes, except Indians of full-blood and Indians under twenty-one years of age, are, except as to homesteads, hereby removed, etc."

Senator Spooner, observing the obvious favor the amendment was receiving in the Senate, and desiring delay, insisted upon his point of order. The ensuing discussion, from which the Government's quotations were taken, together with the language of the proposed amendment, show

conclusively that the Senate was favorably considering a bill to establish a classification including those more than half Indian, although admittedly those more white than Indian predominated, and that the amendment created an arbitrary classification which, as Senator Teller and Senator Spooner pointed out, must necessarily include some incompetents.

The amendment went out on the point of order.

Right here is as good a place as any to correct another erroneous impression which the Government, unwittingly perhaps, has created. On page 29 of its brief, Senator Clapp is quoted as saying, in answer to a question by Senator Spooner, that he thought there were between 900 and 1,100 mixed-bloods who would be affected by his amendment, and the impression sought to be created is that, since there are more than that number of allottees on the reservation having more white than Indian blood, the Senators must have understood and used the term "mixed-blood" in the act as comprehending those only who were half or more white. For fairness sake, let us have the entire colloquy.

"MR. SPOONER: Will the Senator allow me to inquire how many Indians there are who would be affected by that provision.

"MR. CLAPP: There are probably about ten to eleven hundred, I think, that would be affected by it.

"MR. LONG: It is impossible to hear the colloquy which has been going on between the Senators.

"MR. SPOONER: I was endeavoring vainly, not so far as the Senator was concerned, but the Senate, to learn the number of Indians on the reservation who would be affected by this legislation. The Senator from Minnesota has informed me that he thinks about 1,100. Now, I should like to inquire how many of the 1,100 are full-bloods?

"MR. CLAPP: I am not speaking of full-bloods in the 1,100. I think there are about 1,700, all told, on the reservation, and there are somewhere about 900 to 1,100 perhaps of mixed-bloods who are affected by this removal of restrictions. When I first replied to

the Senator from Wisconsin I misunderstood his inquiry" (*Cong. Rec.*, vol. 41, page 2337).

It will be seen from this colloquy that Senator Clapp estimated the total number of allottees to be 1,700 and the mixed-bloods to be about two-thirds of that number. His proportions were not so very far from the correct figures, but the number of allottees greatly exceeds the number he gave. Applying this act to two-thirds of the allottees on this reservation, which is according to the proportions he gave, and there must be included many allottees who are less than half white. It will be seen that no conclusion favorable to the Government's contention can be drawn from this incident.

The ordinary or commonly accepted meaning of the term "mixed-blood" is illustrated and established by the dictionaries and encyclopedias, as well as by cases in which the status of persons of mixed white and African blood were involved. Thus, the Standard Dictionary defined "full-blood" (noun) as "A person or animal of unmixed breed," and "full-blooded" (adjective) as "Of pure or unmixed blood; thoroughbred; as, *an Indian of full-blood.*"

The Century Dictionary and Cyclopaedia defines "*thoroughbred*" as "Of *pure* or *unmixed* breed, stock or race; bred from a sire and dam of the *purest* or best blood."

In the Encyclopædia Britannica, vol. 14, page 467, under the title *Indians*, the description of mixed-bloods shows that the popular meaning of the term includes all persons not pure-blooded or full-bloods. It is there said:

"In the State of Oklahoma, which has absorbed the old Indian Territory, the results of race amalgamation are apparent in the large number of *mixed-bloods of all shades*. * * * In 1879, besides those whose mixed-blood had not been remembered and those who wished to forget it, there were according to Dr. Havard (Rep. Smith'n Inst. 1879) at least 22,000 *métis* in the United States and 18,000 in Canada (*i. e.* in the Northwest in each case). * * *

A considerable number of the chiefs and able men of the various Indian tribes of certain regions in recent times have had *more or less white blood*—Iroquois, Algonkian, Siouan, etc.—who have sometimes worked with and sometimes against the whites. In the case of some tribes there have been '*pure-blood*' and '*mixed-blood*' factions."

This statement, if true, indicates that among the Indians themselves *mixed-blood* is regarded as including all persons not *pure blood*.

In the Century Dictionary and Cyclopedia the term *half-breed* is defined as follows:

"One who is half-blooded; one descended from parents or ancestors of different races; specifically applied to persons descended from certain races of different physical characteristics, as the offspring of American Indians and whites. *In this expression persons with any perceptible trace of Indian blood, whether mixed with white or with negro stock, are popularly included.*"

The ordinary or commonly accepted meaning of the term *mixed-blood* is well illustrated in an article on mixed-bloods in Handbook of American Indians (part 1, p. 913), by Frederick Webb Hodge, and published by the Government Printing Office in 1907 under direction of the Smithsonian Institution, Bureau of American Ethnology, Bulletin 30. The article is too lengthy to quote in full, but a few sentences will suffice to show the sense in which the author used the term.

"**MIXED-BLOODS:** To gauge accurately the *amount* of Indian blood in the veins of the white population of the American continent and to determine *to what extent* the surviving aborigines have in them the blood of their conquerors and supplanters is impossible in the absence of scientific data. But there is reason to believe that *intermixture* has been much more common than is generally assumed. * * *

Of 15,000 persons of Canadian-French descent in Michigan few were probably free from Indian blood. Some of the French mixed bloods wandered as far as the Pacific. * * * Some intermixture of captive white blood exists among the Apache, Comanche, Kiowa, and other raiding tribes along the Mexican and Texas border, the children seeming to inherit superior industry. * * * The Five Civilized Tribes of Oklahoma—Cherokee, Choctaw, Chickasaw, Creek, and Seminole—have a large element of white blood, some through so-called squawmen, some dating back to British and French traders before the Revolution. * * * Under the former laws of the Cherokee Nation any one who could prove the smallest proportion of Cherokee blood was rated as Cherokee, including many of one-sixteenth, one-thirty-second, or less of Indian blood. * * * Some of the smaller tribes removed from the East, as the Wyandot (Hurons) and Kaskaskia, have not now a single full-blood, and in some tribes, notably the Cherokee and Osage, the jealousies from this cause have led to the formation of rival full-blood and mixed-blood factions. * * * The people of Iroquoian stock have a large admixture of white blood, French and English, both from captives taken during the wars of the 17th and 18th centuries and by the process of adoption, much favored by them. Such intermixture contains more of the combination of white mother and Indian father than is usually the case. * * * The Iroquois of St. Regis, Caughnawaga, and other agencies can hardly boast an Indian of pure blood. According to the Almanach Iroquois for 1900, the blood of Eunice Williams, captured at Deerfield, Mass., in 1704, and adopted and married within the tribe, flows in the veins of 125 descendants at Caughnawaga; Silas Rice, captured at Marlboro, Mass., in 1703, had 1,350 descendants; Jacob Hill and John Stacy, captured near Albany in 1755, have, respectively, 1,100 and 400 descendants. Similar cases are found among the New York Iroquois. Dr. Boas (Pop. Sci. Mo., XLV, 1894) has made an anthropometric study of the mixed-bloods. * * * In 1905, there were 20,619

of these adopted negro citizens in these five tribes, besides all degrees of admixture in such proportions that the census takers are frequently unable to discriminate."

In the same treatise, vol. I, page 850, the following definition is found:

"*METS*. 'mixed,' from French *metis*, a derivative of Latin *Miscere*, 'to mix'), or *metis*. A term used by the French-speaking population of the Northwest to designate persons of mixed white and Indian blood. Among the Spanish-speaking population of the Southwest the word *mestizo*, of the same derivation, is used, but is applied more especially to those of half-white and half-Indian blood. The term *mestee*, a corruption of *mestizo*, was formerly in use in the Gulf States. In the West the term 'half-breed' is loosely applied to all persons of mixed-white and Indian blood, without regard to the proportion of each."

Again, in the same volume, on page 365, it is said:

"*CRATTAN INDIANS*.—The legal designation in North Carolina for a people evidently of mixed Indian and white blood, found in various sections of the State, but chiefly in Robeson County and numbering approximately 5,000. For many years they were classed with the free negroes, but steadily refused to accept such classification or to attend the negro schools or churches, claiming to be the descendants of the early native tribes and of white settlers who had intermarried with them. * * * The traces of descent from the lost colony may be regarded as baseless, for the name itself serves as a convenient label for a people who combine in themselves the blood of the wasted native tribes, the early colonists or forest rangers, the runaway slaves or other negroes, and probably also of stray seamen of the Latin races from coasting vessels in the West Indian or Brazilian trade."

"Across the line in South Carolina are found a people evidently of similar origin, designated 'Red

Bones.' In portions of Western North Carolina and East Tennessee, are found the so-called 'Melangeons' (probably from French *melange*, 'mixed') or 'Portuguese,' apparently an offshoot from the Croatan proper, and in Delaware are found the 'Moors.' All of these are local designations for people of mixed race with an Indian nucleus differing in no way from the present mixed-blood remnants known as Pamunkey, Chickahominy, and Nausemond Indians in Virginia, *excepting in the more complete loss of their identity.*"

The above-quoted hand book is cited as authority on Indian matters in *Smith vs. Ronifer*, 154 Fed., 883 (886). The fact that certain of the above-mentioned *mixed-bloods* were popularly classed with *free negroes* should be kept in mind in reading the cases hereinafter cited defining the term *free negro, person of color, etc.*

We shall now consider legal and judicial authorities which have defined or indicated the meaning of the terms *mixed-blood* and *full-blood*.

In *Words and Phrases*, vol. V, p. 4546, it is said:

"Mixed-blood as the term is used in its ordinary signification, means a person in whose veins is *some portion* of African blood."

In 27 *Cyc.*, 811, the term is defined as follows:

"MIXED-BLOOD: As the term is used in its ordinary signification, a person in whose veins is *some portion* of African blood."

In *Hamilton vs. Ry. Co.*, 21 Mo. App., 152, a thorough-bred (animal) was held to be one "*whose ancestry on both sides is perfect in blood* and duly recorded in the American Herd Book," and at the beginning of the opinion it was said:

"For the purposes of this case we shall concede that this question is to be determined in accordance with the rules of evidence governing in cases of pedigree in the human family."

In *Daniel vs. Guy*, 19 Ark., 121, the plaintiffs, who were held in slavery, sued for freedom, claiming to be white persons. "The issue of slavery * * * turned upon the fact whether the plaintiffs belonged to the white or the negro race." The issue of slavery also turned upon the condition of the female parent or ancestor. "No one can be legally held in slavery in this State who is not descended from a female slave of the negro race," and consequently the decision gives no specific definition of a mixed-blood. The whole context of the decision, however, indicates the belief in the judicial mind that a mixed-blood is one having any proportion whatever of admixture of blood of the different races. In the opinion it was necessary to determine the meaning of the term "mulatto," and the court said:

"In the Spanish and French West Indies, persons who belong to the negro race, but who are not full negroes, are distinguished by the following grades:

"The *first* grade is that of the *mulatto*, which is the intermixture of a white person with a negro. The *second* are the *tercerones*, which are the production of a white person and a mulatto. The *third* grade are the *quarterones*, being the issue of a white person and a tercerone; and the *last* are the *quinterones*, being the issue of a white person and a quarterone. Beyond this there is no degradation of color, not being distinguished from white person, either by color or feature. *Wheeler on Slavery*, p. 5, note.

"In our legislation no such classification has been recognized. * * * The legislature, in the acts referred to, have manifestly used the word in a *more latitudinous* sense, and in a sense in which it is generally understood, we presume by the people of this state. That is, they meant to embrace in the term *mulatto*, persons belonging to the *negro race*, who are of an *intermixture of white and negro blood*, without regard to grades.

"With the above understanding of the meaning of the term *mulatto*, as used in our legislation generally, we think the following would be safe rules of evidence:

"1. Where a person held as a slave, sues for freedom, and it manifestly appears that he belongs to the *negro race*, whether of *full or mixed-blood*, he is presumed to be a slave, that being the condition generally of people in this State."

From the quotation above, it will be seen that the court states the rule of the Spanish and French colonies, which extended to a quinterone or 1/16 blood, and then discarded that test because the legislature had meant by mulatto something "*more latitudinous*" and adopted the test of "*intermixture of white and negro blood, without regard to grades*," as determining who is a *mulatto*, and then in the next paragraph referred to NEGROES and MULATTOES as persons of the negro race "whether of FULL OR MIXED-BLOOD." It is perfectly clear that the court regarded the terms *mulatto* (as above defined) and *mixed-blood* as interchangeable, and, consequently, that a *mixed-blood* was there thought to be a person having an "*intermixture of white and negro blood, without regard to grades*."

In *Thurman vs. State*, 18 Ala., 276, defendant was convicted of a statutory offense under an act reading: "Every slave, free negro, or mulatto, who shall commit * * * shall suffer death."

In construing this statute, the court refused to follow the suggestion of the Attorney General that "The common acceptance of the term 'mulatto' is the definition given by the (trial) court, to wit, *any admixture of the white and African race*," and after reviewing the various statutes, said:

"By one of the statutes, it clearly appears that the legislature took the distinction between mulattoes and such as were more remote from the negro stock on one side. By that act '*all mulattoes, Indians, and all persons of mixed-blood, descended from negro or Indian ancestors, to the third generation inclusive, though one ancestor of each generation may have been a white person, whether bond or free, shall be taken and deemed to be incapable in law to be wit-*

nesses in any cause whatsoever, except for or against each other.' *Clay's Dig.*, 600, Sec. 8. IF THE ACT UNDER CONSIDERATION HAD CONTAINED ALSO THE WORDS 'AND ALL PERSONS OF MIXED-BLOOD' OR 'OTHER FREE PERSONS OF COLOR' OR THE LIKE, IT WOULD HAVE EMBRACED PERSONS DESCENDED FROM THE NEGRO STOCK ON ONE SIDE, THOUGH THEY MIGHT NOT BE MULATTOES * * * If the legislature had intended to describe a caste, to include negroes and all persons descended from a negro stock on one side within a certain degree, and subject them all to the same penalties, it is to be presumed that this would have been done by some clear language. If the statute against mulattoes is by construction to include quadroons, then where are we to stop? If we take the first step by construction, are we not bound to pursue the line of descendants so long as there is a drop of negro blood remaining? If not, the point where we should stop can only be ascertained by judicial discretion. This discretion belongs to the legislature. * * * The judgment is reversed, and the cause remanded."

In *Johnson vs. Town of Norwich*, 29 Conn., 407, the plaintiff, a quadroon or person of one-fourth African blood, brought an action to recover taxes paid under protest, basing his action on a statute which exempted from taxation "the person and real estate of persons of color." In the opinion, the court said:

"The general rule for the interpretation of statutes is, that their language shall be construed in its common, ordinary and popular meaning; and we see no reason for departing from that rule in determining the meaning of the words 'persons of color' in the act in question. * * * According to the common, general, and, indeed, universal acceptance of the phrase 'persons of color' in this community, it embraces not only all persons *descended wholly from African ancestors, and therefore of pure and unmixed African blood, but those who have descended in part only from such ancestors, and have a distinct visible admixture of African blood. We therefore*

adopt that construction of the act, and hold that the exemption provided in it applies only to persons proved to be of such descent and also having and disclosing visibly the peculiar and distinctive color of the African race. This construction is according, not only to the ordinary and popular, but also to the strictly proper and correct meaning of the language of the act. It gives effect to all its words, and establishes a rule which is definite, clear and practical, *while it avoids, what we do not feel at liberty to introduce, an arbitrary and artificial test of exemption under the law depending on the proportion of mixed-bloods in the person claiming the exemption.*"

In *Van Camp vs. Board of Education*, 9 Ohio St., 407, a statute providing for separate education of white and colored children was interpreted similarly to the Connecticut statute in *Johnson vs. Norwich*, *supra*. In explaining an inconsistent construction of a prior statute, the court said:

"As between whites and blacks and mulattoes, they might well limit the disability to the mulatto; but if *colored* had been used, then all less than white would have been excluded. There is no margin between white and colored; and all that are not white are colored; in such case the court would have been required to do what they, in the *Williams case*, refused—to consider color as well as blood. Not complexion alone, but complexion and blood combined. *The test of exclusion would have been—IS THE APPLICANT OF MIXED-BLOOD, AND IS THAT ADMIXTURE APPARENT?*"

Can there be any doubt what this court believed to be the meaning of *mixed-blood*?

In *Gentry vs. McMannis*, 3 Dana (Ky.), 382, the plaintiff, held in bondage, sued for freedom, claiming to be a white person. A rule of evidence in force there, as in Virginia, provided that all persons of not less than one-fourth African blood are *prima facie* deemed slaves, and *e converso*, whites. In the opinion the court said:

"3rd. It has been authoritatively adjudged that, on a question of liberty or slavery in Virginia, where slavery is legalized, a black or mulatto complexion, is *prima facie* evidence that the person of such color is a slave; because, in Virginia, where our domestic slavery chiefly sprang, all negroes, mulattoes and Moors, excepting Turks and Moors in amity with Great Britain, were from about the year 1620 to that of 1778, declared to be slaves; and, because, as to slaves, *partus sequitur ventrem* is the established rule.

* * * A WHITE PERSON OF UNMIXED BLOOD CANNOT BE A SLAVE here, where there can be no conventional slavery. BUT AS A PERSON APPARENTLY WHITE MAY NEVERTHELESS HAVE SOME AFRICAN TAINT, and may, consequently, have descended from a mother who was a slave, the apparent color is but *prima facie* evidence; and consequently, when a jury, on their view, decide that the color is white, TESTIMONY WILL BE ADMISSIBLE TO PROVE THAT, notwithstanding the visible complexion, THERE IS AFRICAN BLOOD IN THE VEINS sufficient to doom to slavery."

A precise judicial definition of the terms *mixed-blood* and *full-blood*, in the sense for which we contend, could scarcely convey a more certain meaning than the language of the Kentucky Court of Appeals above quoted.

In *Scott vs. Raub*, 88 Va., 721, in holding that the offspring of emancipated slaves were capable of inheriting real property under the constitution and certain statutes of Virginia, the court said:

"The statute relied on by the counsel, sec. 9 of ch. 103 of the Code of 1860, provided that 'every person who has one-fourth part or more of negro blood shall be deemed a mulatto, and the word negro in any other section of this or any other statute shall be construed to mean mulatto as well as negro,' has no application to any slave, but was intended to apply only to free negroes. The condition of slavery fixed the civil status of any such person as was a slave, and the offspring of the female slave followed the status of the mother, *irrespective of any admixture of white*

blood whatever, and this is apparent by an inspection of the statutes of that Code * * *. The act of February 27, 1866, speaks of colored persons, and the act of 1865-66, ch. 17, sec. 1, p. 84, defines what a colored person is, as follows: "Every person having one-fourth or more of negro blood shall be deemed a colored person."

"The constitution of Virginia, art. XI, sec. 7, provides for slaves by that name; but it is contended that under our statutes in force at that time, and referred to above, James was not a negro, nor mulatto, nor a person of mixed blood, and so in contemplation of law a white man," etc.

That *mixed-blood* there meant a person having an indefinite quantity of admixture of bloods is too clear for argument.

In *Jones vs. Commonwealth*, 80 Va., 548, appellant had been convicted of marrying a white person, he being a negro. The statute specifically defined a negro as a person of one-fourth or more of negro blood. In the opinion we find this significant use of the terms *full-blood* and *mixed-blood*:

From the certificate of facts in this case we find that the accused *was not a full-blooded negro, but had white blood in his veins*; but there was no evidence to show the quantity of negro blood in his veins, and no evidence of his parentage except that his mother was a yellow woman. If his mother was a yellow woman with more than half her blood derived from the white race, and his father a white man, he is not a negro. *If he is a man of mixed blood he is not a negro, unless he has one-fourth at least of negro blood in his veins?*

The legislature of North Carolina, by sec. 5, ch. 71, act of 1836, provided:

"If any white man or woman, being free, shall intermarry with any Indian, negro, mulatto, or mulatto man or woman, OR ANY PERSON OF MIXED

grant to the third generation, bond or free, he shall, by the judgment of the county court, forfeit \$100."

In 1835, A. D. 31, sec. 6 of 1835, the same legislature declared the children of "all negroes, Indians, mulattoes and persons of mixed blood within the fourth generation" to be incompetent against a white person. It is evident from these acts that the lawmakers of that State deemed an express limitation of the term *mixed-blood* to be necessary where a restrictive meaning was intended.

In North Carolina after the terms "negro," "mulatto," and "person of color" had signified a well-understood meaning the term "person of mixed-blood" was used to designate all white persons, whatever of African African descent without reference to the proportion of other blood since acquired. This then was the meaning given the term in the State system from the 1835 to 1868. *Hampden, 31 N. C. 412*, 1868, and from article 1, section 2 of the amendment to the constitution of North Carolina as then written, where the qualifications of voters are defined and limited to be only those of persons "free, mulattoes and the persons of mixed-blood."

In *State vs. Thomas, 31 N. C. 1*, we find a discussion upon the North Carolina statute defining persons of mixed-blood. Throughout the opinion the inference is clear that except to the statutory limitation, a person having any portion whatever of foreign blood in his veins is a mixed-blood. In the statement of facts it is said:

"The defendant was charged with the crime of *seduction*, with carrying a weapon. It was proved that defendant carried a weapon as charged in the indictment. " " " " The jury charged the jury that any person who had one-sixteenth of negro blood in his veins was a free negro. " " " " My construction of the statute is that no person in the life generation from a negro ancestor someone in the third person comes into existence in such gen-

eration was a white person; that is to say, unless there shall be such a purification of negro blood by the admixture of white blood as will reduce the quantity below the one-sixteenth part, and unless there is such a purification it makes no difference how many generations you should have to go back to find a pure negro ancestor; even though it should be a hundred, still the person is a free negro."

The opinion was in part as follows:

"The defendant was indicted as a 'free person of color' for carrying about his person a shotgun, contrary to 68th section of the 107th chapter of the Revised Code. The 79th section of the same chapter declares, 'That all free persons descended from negro ancestors to the fourth generation inclusive, though one ancestor of each generation may have been a white person, shall be deemed free negroes and persons of mixed blood.' The defendant was convicted and moved for a new trial upon two grounds: *First*, because there was no evidence that he was a free negro. *Secondly*, because the judge erred in his instructions to the jury upon the meaning of the statute which proscribes who shall be considered such a person. The counsel for the defendant insists upon both grounds in his argument before us, but relies mainly on the last. * * *

"2nd. The main objection to the charge of the judge is that he, instead of following the rule laid down by the 79th section of the statute, to determine who should be regarded as a free negro within the meaning of the 68th section, misled the jury by making the quantity of negro blood the test by which to ascertain the fact. Taking the charge altogether, we think that it is not obnoxious to censure, and that it lays down the rule correctly according to the statute. By that, as we understand it, no person can cease to be a free negro, unless he has reached the fifth generation from his African ancestor, with a white father or mother in each of the first, second, or third and fourth generations. In that case a simple arithmetical calculation will show that he will not have a sixteenth part of African blood in his veins. * * *

The motion for a new trial being denied him, the defendant, through his counsel, moves here in arrest of the judgment, because he is charged, in the indictment, as '*a free person of color*,' whereas the section of the act under which he is indicted, makes it penal for any '*free negro*' to carry arms about his person.

* * * There can be no doubt that the two terms are sometimes used in the act to which the counsel refers, as synonymous; as, for instance in the 11th and 13th sections, which prohibit free negroes from working in certain swamps without a certificate; and we also think, with the counsel, that there is at least one instance (and one is sufficient for his purpose) in which the terms cannot be so regarded * * *

The last section of the act to which we referred in giving our opinion upon the motion for a new trial, defines who shall be deemed free negroes and persons of mixed-blood, but does not declare who shall be embraced under the term '*free persons of color*.' The amendment to the constitution of the State, art. 1, sec. 3, ch. 3, to which the counsel for the State has referred us, does not remove the difficulty, because the terms there used are '*free negro, free mulatto, or free person of mixed-blood*,' with a similar definition to that given in the section of the act above specified. *Free persons of color may be, then, for all we can see, persons colored by Indian blood or persons descended from negro ancestors beyond the fourth degree.* The indictment then, in the present case, may embrace a person who is not a free negro within the meaning of the act, and for that reason, it cannot be sustained."

In *Hopkins vs. Rowers*, 111 N. C., 175, the syllabus reads:

"Upon the trial of an issue involving the validity of a marriage, it was not error to admit evidence that the wife was reputed to be of *mixed-blood* within the prohibited degrees, or to permit the witness to state his opinion on that point, although not an expert. It was also competent in corroboration of other evidence tending to prove the *taint of blood*, to show that the wife usually associated with colored people."

In the opinion the court said:

"The counsel in his argument here objected to the expressions 'colored person' and 'mixed-blood,' and cited *State vs. Chavers*, 50 N. C., 11. While the terms might not be accurate in an indictment, it does not appear that any objection to the evidence on that ground was interposed below so as to give the witness opportunity to correct his language, and we must assume the jury understood the words in their usual significance."

In *State vs. Davis*, 2 Bailey (S. C.), 558, the court had before it the question as to what is a person of color. It was held to be a question of fact for the jury, but from the opinion it is clear that the court regarded a mixed-blood as one having different bloods in any degree. Referring to the term mulatto, the court said:

"The popular definition in this State, by which we must be governed, seems to be vague, signifying, generally, a person of mixed white, or European, and negro descent, in *whatever proportions the blood may be mixed*. * * * It would be dangerous and cruel to subject to this disqualification, persons bearing all the features of a white on account of some remote admixture of negro blood; nor has the term mulatto, or person of color, I believe been popularly attributed to such a person. The shades are infinite, and it is difficult to fix a limit. I do not know that we can lay down any other rule than to give what appears to be the popular meaning of the word; to wit: that where there is a *distinct and visible admixture of negro blood* the person is to be denominated a mulatto, or person of color."

In the opinion it was said:

"In Louisiana, as I understand, and by the Code Noir of France for her colonies, the descendant of a white and a quadroon, or a person having only one-eighth part of negro blood, is accounted a white. Perhaps it would be desirable that the legislature

make some uniform rule here. The rule may be of use to juries in their decisions—not as a rule of law, which we have no authority to declare it, but as being founded on experience, and conformable to nature.”

The fact that it was thought necessary in France and her colonies to *specify* what proportion of mixed-blood may be considered in classifying persons as to race, clearly indicates that there is no limit unless fixed by the legislature; or, in other words, that any amount of non-Caucasian blood made a mixed-blood unless the contrary was provided by the legislature.

In *Thacker vs. Hawk*, 11 Ohio, 377, the court decided that the constitution of Ohio meant to confer the elective franchise on all persons of more than half white blood. Justice Read dissented, and in his able opinion we find some light upon the term mixed-blood. It appears clearly that he regarded a mixed-blood as one having any degree whatever of blood of another race. He said:

“When the words white or black are employed to designate different races of men, they are applied to men of the same blood or stock. When applied to individuals, to designate the stock or race to which they belong, they mean that the individuals, thus designated, are *purely* of the blood of the white race or the black race. A man of mixed-blood, *partly white and partly black*, cannot be called a white man or a black man, because those words import, that the person to whom applied is of pure blood of the white or black race. *Nor does it matter about the preponderance of blood if there be a mixture; he is of the pure blood of neither the one nor of the other. It is not the shade of color, but the purity of the blood, which determines the stock or race to which the individual belongs.* * * * To say that no person can vote who is not white, is as definite as to say all persons are voters who are less than half black, and of far more easy practical application, because, *where it would be easy to determine whether a man had any black blood in him, it might be impossible to determine the exact amount, in persons who were mixed.*”

In the opinion it was also said that "In Kentucky, where blacks and mulattoes are prohibited from political rights, *all persons of any degree of black blood* are held to be mulattoes."

(b) The tendency, at the time of the passage of the Clapp act, was toward the removal of restrictions upon the alienation of Indian land, and this, too, by arbitrary act.

In the annual report of the Commissioner of Indian Affairs to the Secretary of the Interior, under date of September 30, 1905, the Commissioner outlined an Indian policy. Among other things, he said:

"Moreover, as fast as an Indian of either *mixed or full blood* (the italics are ours) is capable of taking care of himself, it is our duty to set him upon his feet and sever forever the ties which bind him either to his tribe, in the communal sense, or to the Government. This principle must become operative in respect to both land and money." Commenting on the criticism which doubtless would be leveled at his suggestions, he continued: "A second critic will doubtless air his fears as to what will become of the Indian's land and money under this 'wide open' policy. To such an one I would respond: 'What is to become of the land or the money that you are going to leave to your children, or I to mine? Will they be any better able to take care of it for having been always kept without experience in handling property of any kind?' Swindlers will unquestionably lay snares for the weakest and most ignorant Indians, just as they do for the corresponding class of whites * * * In spite of all our care, however, after we have taken our hands off, he may fall a victim to sharp practices; but the man never lived,—red, white, or any other color,—who did not learn a more valuable lesson from one hard blow than from twenty warnings."

"A great deal has been said and written about the 'racial tendency' of the Indian to squander whatever comes into his hands. This is no more 'racial'

"than his tendency to eat and drink to excess, or to
 "prefer pleasure to work; it is simply the assertion
 "of a primitive instinct common to all mankind in
 "the lower stages of social development. What we
 "call thrift is nothing but the forecasting sense
 "which recognizes the probability of a tomorrow; the
 "idea of a tomorrow is the boundary between bar-
 "barism and civilization, and the only way in which
 "the Indian can be carried across that line is by
 "letting him learn from experience that the stomach
 "filled to day will go empty tomorrow unless some-
 "thing of today's surplus is saved over night to meet
 "tomorrow's deficit. Another sense lacking in primi-
 "tive man is that of property unseen. You will
 "never implant in the Indian an idea of values by
 "showing him a column of figures. He must see
 "and handle the dollars themselves in order to learn
 "their worth, and he must actually squander some
 "and pay the penalty of loss before his mind will
 "compass the notion that he cannot spend them for
 "foolishness and still have them at hand for the
 "satisfaction of his needs."

It is true that the Commissioner opposed the arbitrary removal of restraints, and preferred that the matter be left to his Department to decide when they should be removed, but Congress did not share his view. We have already called attention to the fact that section 19 of the act of April 26, 1906 (34 Stat., 144), as it originally passed both Houses, provided for the arbitrary removal of restrictions, and that the Senate was obviously in favor of something of the sort, but postponed it for future consideration. This idea of arbitrarily removing restrictions culminated finally in the passage of the act of May 27, 1908 (35 Stat., 312).

This act continued to recognize the distinction between full-bloods and mixed-bloods, and also classified the mixed-bloods as those having less than half Indian blood, those having half, or more than half, and less than three-quarters, and those having three-quarters or more, and full-bloods, and removes restrictions accordingly.

As introduced in the House this bill classified the allottees in the Indian Territory as (1) "intermarried whites," (2) "freedmen," (3) "less than half Indian blood," (4) "mixed-blood Indians having half or more than half Indian blood," and (5) "full-bloods" (*Cong. Rec.*, vol. 42, page 5074).

In the debate on the bill the following took place:

"Mr. STAFFORD: Under this bill you are permitting alienation beyond the discretion of the Secretary of the Interior, without his approval, and vesting it entirely in these designated classes of Indians.

"Mr. SHERMAN: That is what we are doing, but with the approval of the Secretary. * * *

* * * * *

"Mr. STAFFORD: As I understood the bill when it was read, it takes away the discretion from the Secretary and vests all power of alienation in these designated Indians.

"Mr. SHERMAN: In certain classes and to certain lands" (*Cong. Rec.*, vol. 42, pages 5076-5077).

In his discussion of the bill, Mr. Carter, from Oklahoma, himself a part Indian, said:

"It provides for the removal of restrictions upon
 " the intermarried citizen, the white man, who is not
 " an Indian at all. It provides for the removal of
 " restrictions on the freedman, the former slave of
 " the tribesmen, who is not an Indian at all. It pro-
 " vides for the removal of restrictions upon the lands
 " of the Indian having less than half Indian blood,
 " who is not an Indian at all,—except for revenue
 " purposes. It provides for the removal of restrictions
 " on the surplus allotment of the mixed-blood Indian
 " of half or more than half Indian blood, and there
 " it stops, leaving the entire allotment of the full-
 " blood Indian and the homestead of the mixed-blood
 " Indian of half or more than half Indian blood *in*
 " *statu quo*" (*Cong. Rec.*, vol. 42, page 5078).

In the Senate the bill was amended to make the classification as follows: (1) "intermarried whites," (2) "freedmen,"

(3) "one-quarter or less than one-quarter Indian blood," (4) "mixed-blood Indians having more than one-quarter and less than three-quarters Indian blood," and (5) "full-bloods" (*Cong. Rec.*, vol. 42, page 5425).

It may be observed in passing that this act shows that Congress very readily found terms by which to limit the broad meaning of the term "mixed-blood" when it saw fit to do so.

(c) But it is contended that competency was the test. In other words, that Congress, while using a term with which it was familiar, and which was admirably calculated to express a discrimination based upon the proof of blood status alone, nevertheless meant it to be applied to those only who doubtless could establish their competency before the Secretary of the Interior if required to do so.

It is respectfully submitted that if the idea of competency was the controlling element which influenced Congress to pass this act, what excuse or reason was there for passing it at all, when the subject was fully covered by the Burke act, the act of May 8, 1906 (34 Stat., 182).

Congress is presumed to have had some good and sufficient reason for its legislation, but no good reason or excuse for the Clapp act can be found, if it is to be construed to extend no further than the Burke act.

(d) The court's attention is also respectfully invited to the fact that the construction of the term "mixed-blood" in the Clapp act carries with it the necessity of also construing the term "full-blood." Can any reasonable man contend that Congress used the term "full-blood" in that act as applied to all allottees having less than half white blood? And yet that is the absurdity to which the construction contended for by the Government at this time would lead us. Everywhere, in the popular mind, in the dictionaries and encyclopædias, in the debates in Congress, in the rolls of the Five Civilized Tribes, and in the roll of these very Chipewewa Indians, the idea of a "full-blood" is a person who has

no foreign blood or cannot be proven to have any. Now, Congress recognized only *two classes*, and yet, if the Government's contention is sustained, we have the full-bloods and the mixed-bloods, who are half or more white, provided for, leaving an undistributed middle class of mixed-bloods unprovided for.

We desire now to call the court's attention to a number of general principles of statutory construction which, properly applied, are, we think, sufficient to abundantly sustain the conclusion reached by the Court of Appeals.

2. *In seeking the intent of Congress "the first resort, in all cases, is to the natural signification of the words." Where there is no ambiguity, there is no ground for judicial construction.*

United States vs. Fisher, 2 Cranch, 358.

In *Lake County vs. Rollins*, 130 U. S., 662-670, this court laid down the rules of statutory construction as follows:

"To get at the thought or meaning expressed in a statute, a contract or a constitution, the first resort, in all cases, is to the natural signification of the words. * * * If the words convey a definite meaning which involves no absurdity, nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted. * * * So, also, where a law is expressed in plain and unambiguous terms, whether those terms are general or limited, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction."

To the argument that a certain construction would lead to absurd and harsh circumstances the court replied that the responsibility for that was with the people, not the courts.

In *Sloan vs. United States*, 118 Fed., 283, the syllabus reads:

"In construing treaties or conventions made with the Indians, the terms 'half-blood' and 'mixed-blood' are to be given their ordinarily understood meaning, and no distinction can be drawn between those who derive their Indian blood from the mother and those who derive it from the father."

In *Maillard vs. Lawrence*, 16 How. (57 U. S.), 251, the court, in refusing to interpret a statute as meaning something different from what its words expressed, said:

"The popular or received import of words furnishes the general rule for the interpretation of public laws as well as of private and social transactions; and whenever the legislature adopts such language in order to promulge their action or their will, the just conclusion from such a course must be that they not only themselves comprehended the meaning of the language they have selected, but have chosen it with reference to the known apprehension of those to whom the legislative language is addressed, and for whom it is designed to constitute a rule of conduct, namely, the community at large."

In *United States vs. Pacific Ry. Co.*, 91 U. S., 72, the court, in refusing to extend the terms of a statute, said:

"But this is extending the operation of words by a forced construction beyond their natural and ordinary meaning, which is contrary to all legal rules. Courts cannot supply omissions in legislation, nor afford relief because they are supposed to exist."

In *Parsons vs. Hunter*, 2 Sumn. (U. S.), 422, Mr. Justice Story said:

"I think I may say that unless there be something in the context which deflects the word from its ordinary meaning, and shows a clear intention to use it in a more general or a more limited sense, the former ought to prevail."

And in *Levy vs. McCartee*, 6 Pet. (U. S.), 110, the same Justice said:

"The legislature must be presumed to use words in their known and ordinary signification unless that sense be repelled by the context."

In *The Cherokee Tobacco*, 11 Wall. (78 U. S.), 616, Justice Swayne, in language highly pertinent to the case at bar, said, in interpreting a revenue statute:

"It embraces indisputably the Indian Territories. Congress not having thought proper to exclude them, it is not for this court to make the exception. If the exemption had been intended it doubtless would have been expressed. There being no ambiguity there is no room for construction. *It would be out of place. The section must be held to mean what the language imports. When a statute is clear and imperative, reasoning ab inconvenienti is of no avail. It is the duty of the courts to execute it. Further discussion of the subject is unnecessary. We think it would be like trying to prove a self-evident truth. The effort may confuse and obscure, but cannot enlighten. It never strengthens the pre-existing conviction.*"

In *Edison Electric Light Co. vs. U. S. Electric Co.*, 35 Fed., 138, Judge Wallace said:

"It is not only the safer course to adhere to the words of a statute, construed in their ordinary import, instead of entering into any inquiry as to the supposed intention of Congress, but it is the imperative duty of the court to do so."

3. *A dispute about the meaning of a statute does not of itself show an ambiguity.*

Northern Pacific Ry. Co. vs. Sanders, 47 Fed., 610.

Shreve vs. Cheesman, 69 Fed., 789.

Webber vs. St. Paul City Ry. Co., 97 Fed., 140.

Swartz vs. Siegel, 117 Fed., 13.

4. *Subsequent experience is no guide to construction.*

United States vs. Union Pac. Ry. Co., 91 U. S., 72.

Platt vs. Union Pac. Ry. Co., 99 U. S., 48.

In the case of the *United States vs. Union Pac. Ry. Co.*, *supra*, this court said on that point:

"No argument can be drawn from the wisdom that comes after the fact."

And, again, in *Platt vs. Union Pac. Ry. Co.*, *supra*, this court said:

"There is always a tendency to construe statutes in the light in which they appear when the construction is given. It is easy to be wise after we see the results of experience."

That is exactly what the Government is asking this court to do at this time. If, instead of the dolorous reports to which the court's attention is directed, the field force of the Government were compelled to admit that the effect of the relinquishment of control (even upon those mixed-bloods as far removed from their white ancestors as the extreme case the Government has mentioned) was beneficial beyond the dreams of the most enthusiastic advocate of a "wide open" policy in dealing with the Indians, would the Government then be found in this court, strenuously contending that Congress, while using a broad general term, really meant to say something else? Hardly. And it is a mistaken and misguided notion that brings it here now.

5. *Where Congress has by apt terms created a class, or drawn distinctions between classes of persons or objects, it is not competent for the courts, under the guise of interpretation or construction, to extend or limit the operation of the statute.*

Thus, in *United States vs. Colo. N. W. Ry. Co.*, 157 Fed., 321; 85 C. C. A., 27, the court was asked to do exactly what the trial court did in the suits at bar; that is, read into a statute, by interpretation, a provision not put there by Congress. The decision was upon the Federal Safety Appliance act, which made it unlawful for carriers, engaged in interstate commerce, to operate cars not equipped with a safety coupling device. The defendant was an intrastate road, which handled no commerce on through bills of lading, but merely took commerce from one point to another in the same State, while it was on an interstate journey. It was claimed with much force and upon some authority, that such a railroad was not intended by Congress to come within the statute. The court held the contrary, and in the syllabus stated the following rules which, it is submitted, are decisive of the suits at bar:

"Construction and interpretation have no function where the terms of the statute are plain and certain and its meaning is clear. In such a case Congress must be presumed to mean what it has plainly expressed.

"The natural, common or obvious meaning of the language of a law must be preferred, save in rare and exceptional cases, to a recondite signification evolved only by patient study and diligent search for it.

"Where Congress makes no exception from a plain and certain declaration in an act, there is ordinarily a presumption that it intended to make none. A secret intention of the law-making body may not be lawfully assumed by the courts and interpreted into a statute whose language is plain and unambiguous, and does not express or necessarily imply it.

"Courts can give effect legally to the intentions of the law-making body expressed in a statute, or necessarily implied, and to those only."

In *Brun vs. Mann*, 151 Fed., 145; 80 C. C. A., 513, the court refused to read into a statute an alleged *beneficent* provision not clearly expressed by Congress. The statute

provided that settlers' homesteads should not be liable for "debts contracted" by them, and the court was asked to say that the words "debts contracted" included liabilities for torts of the settlers. But the court refused to extend the terms of the statute, and said:

"It is the intention *expressed in a statute*, and that alone to which the courts may lawfully give effect. They may not assume or presume purposes and intentions that the terms of the statute do not indicate, and then enact or expunge provisions to accomplish these supposed intentions. They may not suppose that Congress intended to exempt these lands from every liability incurred when it expressed the intention to exempt them from every debt contracted only, and then substitute the one term for the other for the purpose of expressing the assumed intention."

In *Paulina vs. United States*, 7 Cranch, 52, Chief Justice Marshall, at page 61, said:

"It is the province of the legislature to declare, in explicit terms, how far the citizen shall be restrained in the exercise of that power over property which ownership gives; and it is the province of the court to apply the rule to the case thus explicitly described, not to some other case which judges may conjecture to be equally dangerous."

In *Folsom vs. United States*, 160 U. S., 121, it was contended by counsel that a statute fixing the right of appeal in capital cases should be construed as allowing a second appeal because the same was allowed in case of minor offenses. Chief Justice Fuller said:

"It is said that this involves the absurdity that convictions for minor offenses are reviewable on a second appeal, while convictions for capital and infamous crimes are not. * * * *The objection really is that Congress should have gone further and given by this act a second review in this court in*

cases of convictions of capital and infamous crimes in the Territories. It may be that there was an oversight in that particular, but if there were, we certainly cannot supply it by construing the fifteenth section as carrying appellate jurisdiction over such cases to the Circuit Court of Appeals, and so enlarging that jurisdiction into something other and different from 'the same appellate jurisdiction' as is exercised in reviewing the judgments of district and circuit courts under section 6 of the act."

In *U. S. vs. Temple*, 105 U. S., 97, it was said:

"Our duty is to read the statute according to the natural and obvious import of the language, *without resorting to subtle and forced construction for the purpose of either limiting or extending its operation.* *Waller vs. Harris*, 20 Wend. (N. Y.), 561; *Pott vs. Arthur*, 104 U. S., 735. *When the language is plain we have no right to insert words and phrases, so as to incorporate in the statute a new and distinct provision."*

In *Yurbide's Ex. vs. U. S.*, 22 How. (63 U. S.), 290, a case where very large land interests depended upon the construction of a statute, the court, in refusing to extend or modify the terms of the statute in question, said:

"If there be no saving in a statute, the court cannot add one on equitable grounds."

In *Minor vs. Mechanics' Bank*, 1 Pet. (26 U. S.), 44, it was urged that a statute fixing the amount of capital stock for national banks should receive a strained construction because of the public benefit that would result therefrom. The argument was held untenable. Mr. Justice Story said:

"It has been urged that public policy requires such an imperative construction of the clause, for the public security. But it is a sufficient answer to that suggestion, that no such public policy is avowed, or can be inferred, from the general terms of the act.

When the legislature intends to restrict the capital stock of a bank, or to require any portion of stock or stockholders to be indispensable for its legal existence and operations, it is not uncommon to incorporate such a restriction into the charter. *The omission to do so is quite as significant that the legislature did not deem such a restriction subservient to any manifest public policy.*"

6. *The court is not at liberty to amend the statute or to read words into it which, it may be contended, Congress has failed to use, for the purpose of expressing what the court may believe to be the spirit of the law, or to escape, in the operation of the law, from what the court may deem an absurdity or an injustice. With the wisdom, practicability, or justice of the law the court has no concern.*

Thus, in *Marwell vs. Moore*, 63 U. S. (22 How.), 185, Mr. Justice Catron, in construing an act concerning alienation of soldiers' bounty lands, passed subsequent to an act imposing restrictions thereon (analogous in many respects to the circumstances in the case at bar), said, at page 191:

"It is insisted that the acts of 1812 and 1826 are on the same subject, must stand together as one provision, and the last act carry with it the prohibition found in the first. We are of the opinion that the acts have no necessary connection; that there was no good reason why the soldier who removed to Arkansas, and inspected his tract of land, then patented, and alienable, should not contract to convey the tract he might get in exchange. *We can here only say, as we did in the case of French vs. Spencer* (21 How., 238), *that the act of 1826 is plain on its face and single in its purpose; and that in such case the rule is, that where the legislature makes a plain provision, without making any exception, the courts of justice can make none, as it would be legislating to do so.*"

In *United States vs. Goldenberg*, 168 U. S., 95, Mr. Justice Brewer, at page 102, said:

"The primary and general rule of statutory construction is that the intent of the law-maker is to be found in the language that he has used. He is presumed to know the meaning of words and rules of grammar. The courts have no function of legislation, and simply seek to ascertain the will of the legislator. It is true that there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional, and only arise when there are cogent reasons for believing that the letter does not fully and accurately disclose the intent. No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute."

In *Hobbs vs. McLean*, 117 U. S., 567, the court said:

"When a provision is left out of a statute, either by design or mistake of the legislature, the courts have no power to supply it. To do so would be to legislate and not to construe. 'We are bound,' says Mr. Justice Buller, in Jones vs. Smart, 1 T. R., 44, 'to take the act of Parliament as they have made it'; and Mr. Justice Story, in Smith vs. Rines, 2 Summer, 338, 354, 355, observes: 'It is not for courts of justice proprio Marte to provide for all the defects or mischiefs of imperfect legislation.' See also King vs. Burrell, 12 A. & E., 460; Lamond vs. Eiffe, 3 Q. B., 910; Bloxam vs. Elsee, 6 B. & C., 169; Bartlett vs. Morris, 9 Port. (Ala.), 266."

In *In re Martin Conway and James Gibbons*, 17 Wis., 526, the question of citizenship, as conferred by the constitution and laws of Wisconsin, was under consideration. In the opinion this remark was made:

"And it is true that if those who framed our constitution and laws had followed the analogy suggested by the acts of Congress on this question, they

would have provided that the minor children of such persons should, on coming of age, be entitled to like rights of citizenship in this State as their father. *But they made no such provision. And whether it was a casus omissus or designed, courts can only take the law as they find it.*"

In *17 Op. Atty. Gen.*, 65, it is said:

"In the construction of a statute words cannot be added thereto for the purpose of supplying an omission, which, on merely conjectural grounds, is thought to have been inadvertently made."

In *St. Louis, etc., Co. vs. Taylor*, 210 U. S., 281; 52 L. Ed., 1061; 28 Sup. Ct., 616, in interpreting a Federal statute, the court said, at page 294:

"It is urged that this is a harsh construction. To this we reply that, if it be the true construction, its harshness is no concern of the courts. They have no responsibility for the justice or wisdom of legislation, and no duty except to enforce the law as it is written, unless it is clearly beyond the constitutional power of the law-making body."

In *Hadden vs. Barney*, 5 Wall., 107; 18 L. Ed., 518, it was said:

"What is termed the policy of the Government with reference to any particular legislation is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes."

Gardner vs. Collins, 2 Pet., 92.

7. We now come to the consideration of another principle or rule of construction, which alone is controlling and decisive in the case at bar, viz: that when a statute has been interpreted by those called upon to enforce it, whether heads of departments or lower officials, and upon that interpreta-

tion titles have grown up or property rights have become established, or for any other reason injustice would result to persons relying upon the departmental construction, if the same were changed, then the courts will follow such departmental construction in all cases of ambiguity, whether the court be of the same opinion or not, and in all other cases unless the same be clearly and unmistakably wrong.

In *United States vs. Union Pacific Ry. Co.*, 37 Fed., 551, (affirmed in the 148 U. S., 562), a case wherein titles had been made and the rights of third parties attached upon the strength of an interpretation of a statute by the Land Department, the court refused to disturb same, although clearly of opinion that if the question were one of first impression the court would have arrived at a different conclusion from that of the Land Department. At page 555, Judge Brewer, then of the circuit court, said:

"Authorities are not wanting in the Supreme Court of the United States, that in cases of doubt the courts will not lightly disturb an interpretation placed by the executive departments of the Government. Justice Trimble said, in the case of *Edwards' Lessee vs. Darby*, 12 Wheat., 206, 210, that such uniform interpretation by the executive department was 'entitled to very great respect'; Justice Story, in *U. S. vs. Bank*, 6 Pet., 29-39, that it 'would, of itself, furnish strong grounds for a liberal construction'; Justice Miller, in *Peabody vs. Stark*, 16 Wall., 240-243, that 'in the absence of a clear conviction on the part of members of the court on either side of the proposition in which all can freely unite, we incline to adopt the uniform ruling of the office of the Internal Revenue Commissioner; Justice Swayne, in *U. S. vs. Moore*, 95 U. S., 760-763, that 'it ought not to be overruled without cogent reasons'; Chief Justice Waite in the case of *U. S. vs. Pugh*, 99 U. S., 265-269, a case which, he says, is 'by no means free from doubt,' calls the principle contended for 'a familiar rule of interpretation.' Justice Woods, in the case of *Brown vs. U. S.*, 113 U. S., 568, 571, after stating that, if the question under consideration were a new one, 'that

the true construction of the section would be open to doubt,' concludes that the principle contended for, 'in case of doubt, ought to turn the scale.' Justice Harlan, in the case of *U. S. vs. Phillbrick*, 120 U. S., 52, 59, says: 'Since it is not clear that the construction was erroneous, it ought not now to be overturned'; Justice Blatchford said in *U. S. vs. Hill*, 120 U. S., 169, 182, 'that the principle contended for has been applied by the Supreme Court as a wholesome one for the establishment and enforcement of justice between the Government and those who put faith in the action of its constituted authorities, judicial, executive, and administrative'; and Justice Field, in *Robertson vs. Downing*, 127 U. S., 607, that it ought not to be overruled without cogent reasons.' It is well said by counsel that 'it is interesting to note the growth of this principle in our law. *From the time Justice Trimble announced it so cautiously in 1827 it has gained strength every time it was again considered by the court. Impelled by the force of its inherent justice, every judge who has taken it up has stated it more strongly than it was stated before.*' And this is a case where that doctrine is eminently worthy of application."

In *U. S. vs. Union Pacific Railway Co.*, 148 U. S., 562, the court followed the construction of the Land Department in interpreting a statute, where lands had been sold on the strength of said construction. The principle involved is clearly applicable in the case at bar. The syllabus reads, in part, as follows:

"If there were any doubt with regard to the interpretation of the act of 1839, the construction placed upon it by the Land Department for eighteen years, under which lands have been put upon the market and sold, would be entitled to considerable weight."

In *Le Marchal vs. Tegarden*, 175 Fed., 682 (November, 1909), the U. S. Circuit Court of Appeals for the Eighth Circuit, in following a departmental construction of a statute affecting the public lands, said, at page 689:

"The Land Department has frequently applied the provisions of section 2732 as well as those of 2369 to cases like the present; * * * *and by its instructions to local land officers had interpreted them as applicable to such cases.* These decisions and working instructions, while not binding upon the courts, are entitled to great respect and ought not to be overruled without cogent reasons. *Hastings R. R. Co. vs. Whitney*, 132 U. S., 357; 10 Sup. Ct., 112; 33 L. Ed., 363; *United States vs. Moore*, 95 U. S., 760; 24 L. Ed., 588."

In *Pennoyer vs. McConnaughy*, 140 U. S., 1, the court said:

"The principle that the contemporaneous construction of a statute by the executive officers of the Government, whose duty it is to execute it, is entitled to great respect, and should ordinarily control the construction of the statute by the courts, is so firmly imbedded in our jurisprudence, that no authorities need be cited to support it. On the faith of a construction thus adopted, rights of property grow up which ought not to be ruthlessly swept aside, unless some great public measure, benefit or right is involved, or unless the construction itself is manifestly incorrect."

In *Maloucy vs. Mahar*, 1 Mich., 26, the court, in interpreting a statute, said, at page 29:

"The construction I have given to the statute is the construction which it has received by the executive department of the State government, and by the county treasurers, ever since the Revised Statutes went into operation, and its correctness has never, up to the present time, been questioned. This construction has become universal, and we are not disposed to disturb it at this time, without stronger reasons than were urged by counsel upon the argument. It has become, to some extent, a rule of property. Many titles depend upon it, and in this view it is important to sustain the acts of the deputy, unless his authority to do the acts complained of is manifestly against law."

"In conclusion, we think that the deputy treasurer had, by a fair and reasonable construction of the statute, the authority to administer the oath required by section 9; and that this construction having been uniformly given to the statute by the State and county authorities, we have the right, even if the statutes were doubtful, to invoke the aid of the legal maxim, *communis error facit ius*, and sustain his authority."

In *Westbrook vs. Miller*, 56 Mich., 148, the court, through Cooley, J., held that a deputy auditor general could make deeds in his own name instead of the name of his principal, and based the decision wholly upon the fact that such construction had been placed upon the statute by other departments of the Government. In the opinion it was said:

"A great many deeds have been executed in this manner, and other acts done which are open to question on the same ground. *The case is therefore one upon which it is probable that large interests depend.*

"If the question were entirely new, and were presented as a question as to the most proper and correct method of executing the duty by the deputy, we should say unhesitatingly that the proper method would be for the deputy to perform the act in the name of his principal. * * * But if, as a new question the practice were one of doubtful validity, yet having continued for many years under a construction of the statute by the proper executive department, and affecting as has been said matters of form only, it ought not now to be disturbed or called in question. * * * When in the performance of executive duties it becomes necessary for the executive department to construe a statute, great deference is always due to its judgment; and the obligation is increased by the lapse of considerable time before its acts are called in question. This has been several times held by the Federal Supreme Court, and by the subordinate courts of the Federal system, and a reference to a few of the cases will be sufficient to show the current of decision. *McKeen vs. Delaney*, 5 Cr., 22; *Surgett vs. Lapice*, 8 How., 48,

71; *Bissell vs. Gilmore*, 8 Wall., 330; *U. S. vs. Pugh*, 99 U. S., 265, 269; *U. S. vs. Lytle*, 5 McL., 9; *Hahn vs. U. S.*, 14 Ct. Cl., 481. * * * The cases in other States which hold the same doctrine are too numerous for citation, but as they all rest upon the inconvenience that would arise from unsettling what in good faith has been done in the necessary discharge of public duty, many citations would only serve to show the frequency in which the occasions for the application of the principle arose."

In *U. S. vs. Alabama R. R. Co.*, 142 U. S., 615, the court, at page 621, said:

"It is a settled doctrine of this court that, in case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change whereby parties who have contracted with the Government upon the faith of such construction may be prejudiced. *It is especially objectionable that a construction of a statute favorable to the individual citizen should be changed in such manner as to become retroactive, and to require from him the repayment of moneys to which he had supposed himself entitled, and upon the expectation of which he had made his contracts with the Government.*"

In *Kelly vs. Multnomah County*, 18 Ore., 356, the court, in interpreting ambiguous provisions of several statutes, said:

"It is believed that the construction here given to these provisions is the same they received by those charged with the duty of their execution ever since their enactment, and this, of itself, would be sufficient to turn the scale if the question were doubtful. In all cases where those persons whose duty it is to execute a law have uniformly given it a particular construction, and that construction has been acquiesced in and acted upon for a long time, it is a

contemporary exposition of the statute, which always commands the attention of the courts, and will be followed unless it clearly and manifestly appears to be wrong."

In *Schell's Ex. vs. Fauche*, 138 U. S., 562, the court, in referring to a statute not previously interpreted by the court, said, at page 572:

"In all cases of ambiguity, the contemporaneous construction, not only of the courts, but of the departments and even of the officials whose duty it is to carry the law into effect, is universally held to be controlling. *McKean vs. De Lancy's Lessee*, 5 Cranch, 22; *Edwards' Lessee vs. Darby*, 12 Wheat., 206; *U. S. vs. Alexander*, 12 Wall., 177; *Peabody vs. Stark*, 16 Wall., 240; *Hahn vs. U. S.*, 107 U. S., 402; *Rogers vs. Goodwin*, 2 Mass., 475; *Endlich on Stats.*, sec. 357."

In *U. S. vs. Moore*, 95 U. S., 760, 763, Mr. Justice Swayne said:

"The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons. *Edwards vs. Darby*, 12 Wheat., 210; *U. S. vs. State Bank*, 6 Pet., 29; *U. S. vs. MacDaniel*, 7 Pet., 1. *The officers concerned are usually able men, and masters of the subject. Not infrequently they are the draftsmen of the laws they are afterward called upon to interpret.*"

This rule has been cited with approval in more than forty subsequent decisions of the Federal courts, and in more than one hundred decisions of the courts of last resort in the States.

In *Johnson vs. Ballou*, 28 Mich., 378, the court, in holding a congressional land grant to be "*in presenti*," said, through Mr. Justice Cooley:

"On the other hand the opinion in the office of the Attorney General has been uniform that an act of

the nature of the one under consideration is a grant *in presenti*. This was the advice of Attorney General Cushing to the Secretary of the Interior under an act almost precisely identical with this (8 Op. of Att'y Gen., 244), and this advice was afterward reiterated by his successor, Judge Black (11 *Ibid.*, 49). * * * These opinions of very eminent lawyers are worthy of high consideration, especially as when giving them they were the official advisers of the Government, and their advice was accepted and acted upon by the Department of the Interior."

In *Kirkman vs. McClaughry*, 160 Fed., 436 (March, 1908), Mr. Justice Van Devanter, then speaking for the United States Circuit Court of Appeals of the Eighth Circuit, said in reference to disputed army regulations:

"At all events, such an interpretation of them cannot be said to be clearly erroneous, and as it is the interpretation actually put upon them for many years by those who were called upon to act under them, as also by those who were charged with the duty of supervising their enforcement, it ought not now to be overturned. *United States vs. Moore*, 95 U. S., 760; *United States vs. Hill*, 120 U. S., 169; *In re Brodie*, 63 C. C. A., 419, 425; 128 Fed., 665."

In *U. S. vs. Bank of North Carolina*, 6 Pet. (31 U. S.), 29, Mr. Justice Story said:

"It is not unimportant to state that the construction, which we have given to the terms of the act, is that which is understood to have been practically acted upon by the Government, as well as by individuals, ever since its enactment. * * * We think the practice was founded in the true exposition of the terms and intent of the act; but if it were susceptible of some doubt, so long an acquiescence in it would justify us in yielding to it as a safe and reasonable exposition."

So long ago as 1833 Attorney General Taney, in 2 Op. Att'y Gen., 558, said:

"When an act of Congress has, by actual decision, or by continued usage and practice, received a construction at the proper Department, and that construction has been acted upon for a succession of years, it must be a strong and palpable case of error and injustice that would justify a change in the interpretation to be given to it."

In *In re State Lands*, 18 Colo., 359, it was said:

"The practical construction given to a statute by the public officers of the State, charged with the performance of public duties in connection therewith, is always entitled to consideration, in cases of doubt."

In *Hill vs. United States*, 120 U. S., 169, 182, it appeared that the clerks of a district court in Massachusetts had, for a long time, appropriated certain fees to their own use without accounting for same to the Government, which fact was known to the judge and the accountants of the Treasury Department. It was extremely doubtful whether the statutes authorized any such procedure, but in a suit to recover same from bondsmen of one of the clerks, it was held there could be no recovery. Especially applicable to the case at bar is the language of the court at page 182:

"With this long practice, amounting to a contemporaneous and continuous construction of the statute, in a case where it is doubtful whether the statute requires a return of the disputed fees, judges of eminence, heads of departments, and accounting officers of the Treasury having concurred in an interpretation in which those concerned have confided, the surety on the present bond, as well as his principal, *had a right to rely on the interpretation in giving the bond*; and the semi-annual accounts of the principal having been actually examined and adjusted at the Treasury, with the naturalization fees included, down to and including the one last rendered five months before this suit was brought, *a court seeking to administer justice would long hesitate before permitting the United States to go back, and not only as against*

the clerk, but as against the surety on his bond, reopen what had been settled with such abundant and formal sanction."

In *Blarham vs. The Consumers' Electric Light, etc., Co.*, 36 Fla., 519, the syllabus reads, in part:

"A practical construction of a statute by a governmental Department, while not of such high authority as a judicial interpretation of the act, is, when not in conflict with the Constitution or the plain intent of the act, of great persuasive force and efficacy."

In *Harrison vs. Commonwealth*, 83 Ky., 162, the court, in reversing a lower court, and interpreting a statute according to contemporaneous construction, said:

"Not only those claiming rights under the law now in question, but the county courts of the State, and those who have had charge of its execution have, for over half a century, interpreted it otherwise; and while this was being done the various legislatures, and the people behind and over them, have known of it and recognized it by failing to interfere. They have, in fact, not only ratified it by their silence, but by their action."

The court then referred to subsequent legislation, which failed to change the construction placed upon the statute in question by co-ordinate departments of the Government, and said:

"Judicial precedent or exposition could not give greater sanctity to it; and as the language of the statute and the legislation upon the same subject, in force prior to its enactment, render it, at least, of doubtful import, we cannot doubt, in view of the long continued legislative, executive and judicial opinion as to it, that the interpretation placed upon it by the lower court is incorrect."

In *State Board vs. Holliday*, 42 L. R. A. (Ind.), 826, the court, quoting *Sutherland on Statutory Construction*, said, at page 833:

"It is presumed that the legislature is acquainted with the law; that it has a knowledge of the state of it upon subjects upon which it legislates; *that it is informed of previous legislation and the construction it has received.*"

What is the state of the evidence touching the practical construction given to this statute by the Indian Bureau, and others, operating under the Clapp act? In the letter of the 2d Ass't Commissioner (Record, pages 71-74) occurs the following opinion:

"After all, are not the expressions 'full-bloods' and 'mixed-bloods' as used in the acts of the Congress of June 21, 1906 (34 Stat. L., 325, 353), and March 1, 1907 (34 Stat. L., 1015), to be interpreted and construed in the light of the ordinary every-day meaning of such words and expressions, without attempting to give a technical or extravagant interpretation, and thus perhaps substitute a meaning evidently beyond the true one intended by the Congress? The office is inclined to the view that the words and expressions are to be construed in their ordinary meaning, and that this interpretation and construction is more reasonable and plausible than to hold that the term 'full-bloods' includes those of the admitted pure blood and others above the half-blood."

That statement was made in November, 1910, over four years after the controversy had arisen. In spite of the weak attempt of the Bureau to minimize its effect, this expression of the opinion of the Indian Office at that time, coinciding as it does with Michelet's statement of his instructions four years before, shows conclusively that, until the opinion of the office was affected by some outside suggestion, it was and continued to be identical with what was expressed by the office in construing the term "mixed-blood" in the Treaty of September 30, 1854. (See Record, pages 19, 146, and

180.) In this connection, the court's attention is called to the fact, as disclosed by Defendant's Exhibits "7-d" (Record, page 90) and "10-c" (Record, page 99), that the Special Assistant to the Attorney General and the Special Indian Agent, to whom was especially entrusted the duty of passing upon applications for fee patents, after the investigation of the White Earth affairs was turned over to the Department of Justice in 1909, passed as mixed-bloods, and recommended that fee-simple patents issue to William Daily and Ne-bin-ay-ge-shig, one of whom is shown by the so-called Hinton Roll (Defendant's Exhibit "5"), (Record, page 84) to be 31/32 Indian, and the other 15/16. This Hinton Roll was approved December 31, 1910, and was in course of preparation by these very men at the time they recommended that these particular Indians be passed as mixed-bloods.

From Mr. Michelet's testimony (Record, page 80), no other conclusion can be reached than that the term "mixed-blood" was deliberately construed by the Indian Office soon after the passage of the act, and upon that construction he and all others, dealing with the question, acted.

From the testimony of Mr. Hamilton, Mr. West and Mr. Bullis (Record, pages 22, 25, and 45), all old residents and prominent citizens of Detroit, it appears that the public was influenced and guided by the Indian Office's construction of the term, and followed it, and extensive transactions have been based upon it. For four years and more that construction has been the rule, both in the Department and out of it. Should the court disturb it now, because it deems the Clapp act was too extensive, and thinks that the way to limit its operation is by construction? The way to limit the operation of the Clapp act, if the court deems it its duty to limit it, is by refusing to *find as a fact* that an Indian has any foreign blood, where the only proof is the vague tradition that away back five or six generations one of his ancestors was not an Indian. The construction contended for by the present representatives of the Department of Justice would lead the court to fix an arbitrary standard as little supported by any

substantial presumption of fact as the one adopted by Congress. The effect of the infusion of white blood does not increase or diminish in direct proportion with the amount of white blood an individual Indian may have. That the infusion of foreign blood improves the breed is not only established by the evidence, but is supported by reason and common experience. And common experience, as well as the evidence, establishes the fact that a slight amount of this infusion is just as apt to beneficially affect an individual as an infusion derived from an immediate ancestor. We must assume that Congress knew this, and adopted the single classification it did, with such facts in mind.

In the suits at bar overwhelming force is given to this principle by the fact that not only was the Clapp act passed once, but it was passed again about eight months later and its operation deliberately extended. The court will please recall in that connection that between the passage of the act in June, 1906, and the re-enactment of it in March, 1907, the Indian agent at White Earth had been to Washington for consultation with the Indian Bureau with regard to the construction of the act of June 21, 1906; that the matter had been considered and discussed in that Department, and that its understanding of the extent and operation of the terms used had been communicated to the public through the Agency Office at White Earth, and, further, that the construction placed upon the terms of the act by the Indians themselves, and by the persons dealing with them, must unquestionably have been known to the Department at the time of the re-enactment of the law. The conclusion from all of these circumstances is unanswerable, that in the re-enactment of the act Congress must have certainly used the term in the sense in which the Department then understood it, and in which everybody on and around the White Earth Reservation was using it. This condition of affairs destroys every particle of the ground work of the argument of counsel for the Government.

Every equitable principle applies with peculiar force here. The facts at bar would unquestionably work an estoppel as between individuals, and upon every principle of equity and good conscience they should so operate in these cases. This is a court of equity, and the Government has come into it voluntarily. Whatever the court may think should have been the construction of the Clapp act as an abstract question, it should hold now that the construction adopted by the Indian Office fifty-seven years ago in a similar case, reiterated in its oral instructions to the Indian agent Michelet in 1906 and communicated by him to the public, and again expressed by the Indian Office in November, 1910, should bind the Government now, and that the term "mixed-blood" as used in the Clapp act should be construed to mean any person who can be identified (that is, proven) to have any admixture of Indian and foreign blood. Especially is this true since it is made to appear in this record that the Indians, and the public, as well as the Indian Office, have construed the act in the manner contended for by us, and large expenditures have been made in good faith in reliance thereon, and rights and titles have been acquired long before there was any suggestion that the Government might take a different position.

There is another important feature in these cases which we feel we are entitled to have carefully considered. Attention has been called to the total absence of any suggestion in the bills of any fraud or improper inducement or inequitable conduct on the part of the defendants in these cases. Further than that the court will observe from the record (pp. 18, 145, and 179) that it was shown on the part of the defendants that full and fair consideration was paid in each case, and that at the time of the conveyance by the allottee he represented and made oath to the fact that he was one of the class from whom restrictions had been removed, and that the defendants entered into the transaction in reliance upon such oath and representations without knowledge or

information as to the truth or falsity thereof and without means of ascertaining the true facts with relation thereto. It was further shown that no offer or effort had been made on the part of complainant to do equity. It was further shown by the evidence that the scope of the act of June 21, 1906 (known as the Clapp act and hereinafter more fully discussed), had been under consideration in the Indian Office within a short time after its passage on the occasion of the visit of the Indian agent at White Earth to Washington for the purpose of obtaining instructions relative thereto, and that at that time it was agreed, and the Indian agent was instructed, as to the scope of the act, and that view of the Indian Office was made public (Record, p. 80, and Testimony of George D. Hamilton, p. 22). It is obvious that upon these facts every principle of equity and good conscience dictates that the relief sought by the Government in these suits should be denied, unless there is something so peculiarly sacred and omnipotent in the Federal Government as to remove it entirely from the operation of those plain and well-established principles of equity which are daily applied in the courts as between man and man. We assert that upon the authorities the United States is in no better or more exalted position than a private suitor when it elects to come into its own courts of equity to seek equitable relief. The reason for this principle is obvious. In its sovereign capacity the Government is supreme over its citizens. If its lands are invaded, the intruder can be summarily ejected. If its power is resisted, it can bring to its aid all the resources of this mighty nation to carry its will into effect. It is not necessary for it to resort to its courts; but when it does so, whether it comes as a proprietor or as a trustee, or as a guardian, or in its governmental capacity for the purpose of enforcing a governmental policy, it must be held to have elected to place itself in the position of a suitor in a tribunal where equitable principles are supreme and which delights in dispensing justice with a fair hand.

It is a fundamental principle of this court of equity that he who would have equity must do equity. And this is a principle firmly inbedded in our law and repeatedly recognized and applied by our courts.

The status of the parties to this litigation is clearly defined by the late case of *State of Iowa vs. Carr*, 191 Fed., 257, 112, C. C. A., 477, decided October 20, 1911. The action was brought by the State of Iowa to determine the ownership of certain islands in the Missouri River. At page 265 the court said:

"Counsel for the appellant, however, invoke the general rule that neither by the statute of limitations, nor by laches, does mere delay bar the sovereignty from maintaining its rights or from sustaining a suit to enforce them. * * * They also contend that every sovereignty is exempted from the rule of equitable estoppel.

"But the great weight of authority, the stronger reasons and the settled rule upon this subject in the courts of the United States, is that, while mere delay does not either by limitation or laches, of itself constitute a bar to suits and claims of a State or of the United States, yet, when a sovereignty submits itself to the jurisdiction of a court of equity and prays its aid, its claims and rights are judicable by every other principle and rule of equity applicable to the claims and rights of private parties under similar circumstances. The equitable claims of a State or of the United States appeal to the conscience of a chancellor, with the same, but with no greater or less force than would those of an individual under like circumstances."

At page 268 the court quotes from the Circuit Court of Appeals of the Sixth Circuit in *United States vs. Chandler-Dunbar Co.*, 152 Fed., 25; 81 C. C. A., 221, as follows:

"Following the ancient common-law maxim, '*Nullum tempus occurrit regi*,' it has been settled as the rule here that the United States is not affected in respect to its pursuit of remedies by mere delay or general statutes of limitation. But when it sues in

equity as a private suitor on a cause of action relating to its proprietary interests, it is held to be affected by those equities which are recognized as fundamental in controversies between private parties. And why should this not be so? It derogates from the dignity and character of the Government to suppose that, formed as it is to secure impartial justice between individuals, it may nevertheless in the conduct of its own affairs, without regard to the principles it represents, perpetrate upon its citizens wrongs which it would promptly condemn if practiced by one of them upon another."

The decision in *United States vs. Walker*, 139 Fed., 409, is also quoted as follows:

"When the sovereign comes into court to assert a pecuniary demand against the citizen, the court has authority, and is under duty, to withhold relief to the sovereign, except upon terms which do justice to the citizen or subject, as determined by the jurisdiction of the forum in like subject-matter between man and man."

For an elaborate discussion of the earlier law on this subject see *Michigan vs. Jackson, L. & S. R. Co.*, 69 Fed., 116; 16 C. C. A., 345, and note on page 353.

In *French Republic vs. Saratoga Vichy Co.*, 191 U. S., 427, it was said at page 438:

"In such cases either where the Government is suing for the use and benefit of an individual, or for the prosecution of a private and proprietary instead of a public or governmental right, it is clear that it is not entitled to the exemption of *nullum tempus*, and that the ordinary rule of laches applies in full force."

United States vs. Beebe, 127 U. S., 338.

New Hampshire vs. Louisiana, 108 U. S., 76.

Maryland vs. Baldwin, 112 U. S., 490.

United States vs. Des Moines, 142 U. S., 510.

Curtner vs. United States, 149 U. S., 662.

United States vs. Bell Tel. Co., 167 U. S., 224.

Miller vs. State, 38 Alabama, 600.

Moody vs. Fleming, 4 Georgia, 115.

"The plaintiffs then are put in this dilemma: If the Republic be a necessary party to the suit here, as it sues in its private and proprietary capacity, the defense of laches is available against it. Upon the other hand, if it be an unnecessary party, the defense of laches may certainly be set up against the Vichy Company, its coplaintiff."

In *St. Paul, etc., Ry. Co. vs. First Division, etc.*, 26 Minn., 31, the title to an island in the Mississippi River was in dispute. One party claimed under an original Government survey and patent, and the other claimed under a subsequent survey and patent. The court said:

"The record contains copies of the official plats of section five, town twenty-eight, and section thirty-two, town twenty-nine. Upon these plats the Mississippi River, through or opposite these sections, is delineated. The plats show no island in that part of the river, no land between which and the main land any channel runs. From them it appears that the lots granted to Robert and Kittson extend to the body of the river, the main stream. By the survey, as shown on the plats, the strip in question was surveyed, not as an island, but a part of the main land, and included in those lots. *After the Government has sold lands according to a survey and plat, it cannot (as a general rule, at least) dispute the truth of such survey and plat.* *Bates vs. Ill. Cent. R. Co.*, 1 Black, 204; *Lindsey vs. Hawes*, 2 Black, 554; *Railroad Co. vs. Schurmeir*, 7 Wall., 272. If there be any case in which, after a sale of the lands, the Government may question the accuracy of the survey and plat by which it is sold it is not such a case as this. *There is nothing to call in question the good faith towards the Government of the surveyors who made the first survey.* The testimony makes it doubtful whether, at the time of that survey, the strip in controversy was an island or part of the mainland. In such case the surveyors may determine, to the best of their judgment, whether such strip should be surveyed as an island or a part of the mainland; and if their survey is approved, and the land sold according

to it, *the Government is bound by their action*. This being so, the title to the strip in question passed under the patents to Robert and Kittson, and as a consequence the subsequent survey and platting of it as an island was unauthorized, and the patent issued to Lamb, pursuant to it, passed no title. For the same reason, the proceedings of the officers of the Land Office, upon Lamb's application to pre-empt under the subsequent survey, which plaintiff offered to prove, were null. *Those officers could have no jurisdiction to determine anything in relation to lands which the United States had already conveyed.*"

The Government may be estopped by its own acts in reference to land titles. In *Menard vs. Massey*, 49 U. S., 292, the title to certain Spanish "concessions," made before the Louisiana purchase, was in dispute. It appeared that the Government had subsequently confirmed such title according to a Government survey made for that purpose. It was contended that the survey was incorrect. The syllabus reads:

"Where claims were confirmed according to the concession, a subsequent survey made in the mode pointed out by law is conclusive upon the United States and the confirmee, to show that the land included in the survey was the land the title to which was confirmed."

In *Vermont vs. Society, etc.*, 2 Paine (U. S. Circuit Court), 545, it was said at page 556:

"By the act of the 30th of October, 1794, as set out in the plea, the legislature granted to the town of Berlin, forever, the use of the land for the benefit of the town. *The State thereby parted with all interest it had in these lands, and is estopped thereby from claiming any right thereto. That the doctrine of estoppel applies to a State as well as to private persons, cannot be questioned.* It was so considered by the Supreme Court of Massachusetts, in the case of *The Commonwealth vs. The Rejepscut Proprietors*; the legislature, by a public resolve, had declared that

a certain monument was considered the one mentioned and intended in an ancient Indian deed, under **which** a title was derived to certain proprietors; and it was held, that the Commonwealth was estopped from afterwards showing that such monument was not the one intended by the deed."

In *Magee vs. Hallett*, 22 Ala., 699, it was said at page 718:

"It appears from the bill of exceptions, that evidence was offered tending to show that the land embraced by the Baudain concession was claimed by the proprietors under the Price Grant; that the survey of that claim was made by James, the United States surveyor, by the procurement of Joshua Kennedy; that its adoption in the Land Office was urged by him; that it was recognized by the Government; that the patent certificate, and the patent for the Price claim, which was taken out and recorded by Kennedy, fixed the Collins and Henshaw south line as the north line of the Price tract; and that this line was recognized by the Kennedys, in their maps, surveys, etc. If these facts were established to the satisfaction of the jury, *we consider that both the United States and the Kennedys were imperatively bound by the line which they had thus adopted and recognized.* The Price claim was inchoate and incomplete, and its location and survey were provided for by the acts of 1822 and 1829 (3 U. S. Stat., 700; 4 *ib.*, 359); and as by this survey the south line of the Orange Grove tract, as run by Collins and Henshaw, was adopted as the north boundary of the Price grant, and the United States and the Kennedys having agreed to this survey, they must be regarded as parties to the selection of the land according to it, *and are mutually bound and respectively estopped by it.* *Menard vs. Massey*, 8 How., 293-313."

In the late case of *Heckman vs. United States*, *supra*, this principle is fully recognized, even in a case where on demurrer it was admitted that the allottees had been fraudu-

lently induced to execute conveyances. Commencing at the bottom of page 438 the court said:

"Whether these restrictions upon the alienation of the allotted lands had been violated and the alleged conveyances were void, was a justiciable question; and in order that it might properly discharge its duty, and that it might obtain adequate relief, *suited to the nature of the case in accordance with the principles of equity*, the United States was entitled to invoke the equity jurisdiction of its courts."

8. Apt and accurate terms with which to create classifications based upon a definite proportion of mixture of Indian and other than Indian blood, were available, and were habitually used by Congress when it desired to create such a classification. If Congress had so intended in this case it could easily have said so.

We have previously referred to the many treaties in which accurate terms such as "half-blood" or "quarter-blood" have repeatedly been used. In the treaty with the Sioux of 1837 (Kappler, Vol. II, page 493, 7 Stat., 538), provision is made for persons "*having not less than one-quarter of Sioux blood*," and the same provision is found in the treaty with the Winnebago Indians of the same year (Kappler, Vol. II, 499).

In *Pennock vs. Commissioners*, 103 U. S., 44, the court interpreted section 10 of a certain treaty with the Sacs and Foxes (15 Stat. at L., 467), as follows:

"These stipulations, which are set forth in the first five articles of the treaty, would be deemed to apply to all members of the confederate tribes, but for the special provisions contained in article 10. The latter relate exclusively to such members as were either '*mixed and half-bloods*' or *women, being whole bloods*, who had intermarried with white men. To each of them, three hundred and twenty acres were to be assigned from that portion of the land relinquished by the treaty to the United States in

trust, provided the parties desired to take such tracts. The lands thus granted were to remain inalienable except to the United States or members of the tribes, and the grantees were not to participate in the proceeds of the land sold. This article operates as a limitation upon the provisions of the previous articles, and confines them to members of the tribes other than the *mixed or half-bloods*, or the *females intermarried with white men*. These parties, by accepting the grant of the tenth article, were excluded from the benefits and freed from the restrictions of the other articles, except as they were repeated in it. Under it various tracts of the quantity specified were assigned to the parties coming under the classes designated, and, among others to Mrs. Pennock,—who is of mixed and half-blood,—the plaintiff in this suit, at the time the wife of William Whistler."

In *Smith vs. Bouifer*, 154 Fed., 883, it was said:

"Treaty stipulations with the Indians, however, are deemed to apply to half-breeds, as well as full-bloods, unless otherwise specially provided in the treaty. *Sixty Mixed Bloods*, 20 Opinions of Attorneys General, 742, 743; *Pennock vs. Commissioners*, 103 U. S., 44, 46; 26 L. Ed., 367."

These cases, together with the many treaties in which half-breeds and quarter-bloods are specifically named, indicate that both Congress and the courts interpret the term "mixed-blood" as having a different meaning from the term *half-blood* or *quarter-blood*, and that if any particular quantum of blood had been meant, it would have been designated, and the term "mixed-blood" would not have been used.

The foregoing authorities are overwhelmingly convincing, as well from necessary inference as from express declaration, that in popular parlance, in legislative intendment, in judicial thought, and in specialized learning, the terms *mixed-blood* and *full-blood* have been used in their ordinary

sense to describe a person or animal having an admixture of different blood in any proportion, or having pure blood, as the case may be, and that nowhere have the terms ever been considered as limited by definite mathematical proportions, except when the same are specifically expressed. The only exception which anywhere appears is found in the fact that, in popular language, the term "half breed" Indian has sometimes been thought to include all persons having any perceptible trace of mixed blood in their veins—a fact in which surely there is no consolation for the complainant.

It is strenuously contended, however, that Congress, in removing the restrictions on alienation by mixed-bloods, intended the act to apply only to those having a sufficient portion of white blood to render them more shrewd and capable of managing their own affairs than the untutored and simple-minded full-blood savage, possessed of but vague and hazy ideas of individual property rights; and that, consequently, the courts, in interpreting the terms "*mixed-blood*" and "*full-blood*" should give effect to the supposed intention of Congress by departing from the ordinary sense in which the terms have universally been used, and limiting the same to a fixed mathematical proportion, so that to the statute, solemnly enacted by Congress without limitation, there shall be added the condition that restrictions are removed in the case of all mixed-bloods "of half or more white blood," and that all Indians having more than half Indian blood shall be considered full-bloods. It is claimed that such a construction is necessary in order to save the court from convicting Congress of having done a foolish thing by not defining the terms used in the statute. The proposition that it is a function of the judiciary to protect the legislature from criticism, or from inadvertent or inadvisable action, by adding to the terms of its statutes such conditions and provisos as may be thought by the court to be necessary for that purpose—by judicially enacting such laws as in the opinion of the court Congress ought to have passed—is so startling,

so novel, and so revolutionary as to merit very careful consideration before it is adopted as sound. The Federal Constitution, and the constitutions of all the States, were built upon the fundamental idea that the legislative, executive, and judicial departments of Government should be, and forever remain, entirely free and independent of each other. That principle has always been tenaciously adhered to by the respective governmental departments, and zealously protected by the courts—and by no other court so persistently as by this court. We challenge counsel to find in the Federal Constitution, or in any decision ever rendered in any court of this country, a single word or thought to the effect that the power of Congress is limited to legislation that is not foolish, or inadvertent or unwise; or that the courts are corrective tribunals burdened with the duty of modifying or altering or abrogating unwise legislation. In the case at bar, is the application of such a test possible or practical, even if it had judicial sanction? How are we to determine that a one-half blood white, rather than a quarter-blood, is possessed of the degree of wisdom supposedly intended by Congress, *but not expressed*, in the statute? Will the court be advised, through medical or psychological experts, how much white blood is required to make an Indian wise? How wise did Congress think a mixed-blood ought to be in order to sell his own property? Is there any rational ground for supposing that the intelligence of a mixed-blood depends upon a *mathematical* proportion of white blood? Has the *quality* of the white blood nothing to do with the question? Might not a one-sixteenth blood descendant of a shrewd Caucasian trader be as wise as a half-blood descendant of a shiftless lumber jack? If we are going to add conditions to the statute in order to protect Congress from the assaults of persons having a different opinion as to the wisdom of the law, shall we not proceed scientifically instead of arbitrarily? These queries are not foolish; they show the utter impossibility of justifying the addition to the words of the statute of a definite or fixed quantum of white blood as the test in-

tended by Congress. Will the statute be made a foolish law by interpreting it as meaning what it says? The facts disclose that long before the enactment of this statute the proper officers of the Interior Department had interpreted the term "*mixed-blood*" as including all Indians having any portion of white blood in their veins. Even if the terms were used unwisely, or inadvertently, or unintentionally, the inexorable fact remains that the words of the statute embrace all mixed-bloods, without any limitation whatever as to the quantity or proportion of white blood, and by every known rule of construction the act must be given effect as written by Congress. Neither a counterbalancing of equities, nor a desire to improve the statute, or to do what Congress omitted to do, or to correct what Congress inadvertently or unwisely did, can justify a judicial rewriting of the statute. That power reposes in Congress alone, and not in the courts, as the authorities hereinbefore cited fully prove.

The contention that Congress meant to place any limitation upon the natural meaning of the terms used is disproven both by the familiarity of that body with the meaning of the terms, and the ease with which the natural meaning could have been limited. In about forty statutes or treaties which we have cited, and probably in hundreds of others which we have been unable to examine, Congress used the terms *half-blood*, *half-breed*, and *quarter-blood* where it was desired to apply a more definite descriptive term than *mixed-blood*, and in at least two instances cited, Congress used the terms "OF NOT LESS THAN ONE-QUARTER OF SIOUX (OR WINNEBAGO) BLOOD." In the interpretation of the statute in the case at bar, passed in the wake of all this Indian legislation, where more definite descriptive terms were used when wanted, there cannot be the slightest basis for doubt that if Congress had intended the term *mixed-blood* to be limited to Indians having not less than one-fourth or one-eighth or one-half white blood the intention would have been expressed by inserting such limiting term in the statute. The act reads that all restrictions as to the sale of lands "*held by*

adult mixed-blood Indians, are hereby removed," etc. How easy it would have been to say, if Congress had so intended, that all restrictions as to lands "held by adult mixed-blood Indians OF NOT LESS THAN ONE-HALF WHITE BLOOD are hereby removed." In every similar case ever passed upon by the Federal courts they have refused to write into the statute any limitation that could have been so easily expressed by Congress, if such had been its intention.

Thus, in *Farrington vs. Tennessee*, 95 U. S., 679, the court, at page 689, said:

"If it was intended to make the exception claimed from the universality of the exemption as expressed, it would have been easy to say so, and it is fairly to be presumed this would have been done. In the absence of this expression, we can find no evidence of such an intent."

In *Bank vs. Matthews*, 98 U. S., 621, 627, the court said:

"The opinion of the Supreme Court of Missouri assumes that the loan was made upon real estate security within the meaning of the statute, and their judgment is founded upon that view. These things render it proper to consider the case in that aspect. But, conceding them to be as claimed, the consequence insisted upon by no means necessarily follows. The statute does not declare such a security void. It is silent upon the subject. If Congress so meant, it would have been easy to say so; and it is hardly to be believed that this would not have been done, instead of leaving the question to be settled by the uncertain result of litigation and judicial decision."

In *United States vs. Koch*, 40 Fed., 250, 252, Judge Brewer said:

"Again, when the act of 1881 was passed, if Congress had intended that penalty should be imposed for a trespass upon the rights conferred by that statute, or if it had intended that the act of 1876 should be revived and operate upon the act of 1881,

it was very easy to say so. Its silence in this respect is cogent evidence that it did not understand or intend that the penal statute should be considered a part of present and valid law."

In *In re Drake*, 114 Fed., 229, 232, it was said:

* * * "if the intent was to limit the protection of persons engaged in agricultural pursuits to those only who were farming upon a small scale, *it could easily have been done.* It might be difficult to find a good reason why this defendant should be protected from the consequences of an act which, in every other class, would entail adjudication in bankruptcy; *but it is not for the courts to vindicate the wisdom of laws which it is their duty to administer.*"

In *Moore vs. Am. Transportation Co.*, 65 U. S., 1, at page 32, the court said, in referring to a statute concerning navigation on the Great Lakes:

* * * "if Congress intended to have excluded them from the limitation of the liabilities of owners, it would have been most natural and reasonable, and, indeed, almost a matter of course, *to have referred to them by a more specific designation.*"

In *Shaw vs. Railroad Co.*, 101 U. S., 557, 565, the court, referring to certain results claimed by counsel to have been embraced in a statute making bills of lading negotiable, said:

"If these were intended, surely the statute would have said something more than merely make them negotiable by indorsement."

In *Harrington vs. Herrick*, 64 Fed., 469, 471, counsel urged that the status of a surviving partner had been changed by statute. In overruling this contention, the court said:

"If this had been the intention surely it would have been clearly expressed, as counsel for the defendant rightly urges."

In *Austin vs. United States*, 155 U. S., 417, 433, Chief Justice Fuller, in refusing to give an act a meaning different from that actually expressed, said:

"* * * if such had been the intention of Congress, no reason suggests itself why Congress should not have unequivocally said so."

In *In re Downing*, 54 Fed., 470, 474, the court, in refusing to restrict the meaning of a statute to less than its actual terms, said:

"If Congress had not intended to place the duty on vermillion red of all kinds, *that purpose could have been readily expressed*; and we cannot doubt it would have been expressed by placing it upon 'vermillion red containing quicksilver,' instead of upon 'vermillion red, and all colors containing quicksilver.'"

In *21 Op. Att'y Gen.*, 418, Attorney General Whitney said:

"Had they (members of Congress) *so intended*, it would have been easy to say so."

To the same effect, see

- Louisville Trust Co. vs. Cincinnati*, 73 Fed., 726.
- Parker vs. U. S.*, 22 Ct. Cl., 104.
- Grace vs. Collector of Customs*, 79 Fed., 319.
- Strode vs. Stafford Justices*, 1 Brock (U. S.), 162.
- Ryan vs. Carter*, 93 U. S., 83.
- Tompkins vs. Little Rock*, 125 U. S., 127.
- U. S. vs. Ryder*, 110 U. S., 739.
- Leavenworth vs. U. S.*, 92 U. S., 744.
- Butz vs. Muscatine*, 8 Wall., 580.
- James vs. Milwaukee*, 16 Wall., 161.
- U. S. vs. Anderson*, 9 Wall., 66.

- Lawrence vs. Allen*, 7 How., 796.
Northern Pac. Ry. Co. vs. Dudley, 85 Fed., 86.
In re Baker, 96 Fed., 957.
In re Baumann, 96 Fed., 948.
Steele vs. Buell, 104 Fed., 970.
U. S. vs. Shrengerm, 113 Fed., 525.
Ex parte Byers, 32 Fed., 409.
Ulman vs. Meyer, 10 Fed., 243.
Hall's Case, 17 Ct. Cl., 46.

Before passing this point, however, we desire again to call to the attention of the court the act of May 27, 1908 (35 Stat., 312), which classified the allottees in the Indian Territory and removed restrictions according to class. How easy it would have been for Congress to have done the same thing in this act, if it had intended to do so. The omission to make any such limitation is indicative of the legislative intent that none should be made. Even if Congress passed the Clapp Act through haste or carelessness the first time, and omitted to state its intention as clearly as the Government thinks it should, there was no excuse for this omission the second time it was passed. It appears that the Indian Bureau knew all about the criticisms of it, and doubtless would have called the attention of Congress to the unlimited construction being placed upon the act if it had been thought at that time that Congress did not mean what it said.

Conclusion.

If the court is not convinced by this time that the decision of the Circuit Court of Appeals is sound, and the only one that can reasonably and properly be made on this question, it must at least be satisfied that we are convinced of it. For over six years litigation has been pending in the United

States courts of Minnesota, in which the United States is plaintiff, touching the legality of conveyances by allottees on the White Earth reservation, and the suits, of which the pending cases are samples, were filed between August, 1910, and February, 1913. The total amount of land involved is over a hundred thousand acres, and the defendants are numerous, including farmers, merchants, bankers, land dealers, lumber companies, professional men, school teachers, and some of the Indians themselves, who have bought land or traded with other Indians. With the exception of a few suits which were filed to cancel conveyances alleged to have been executed by minors, practically none of the suits involve the conveyances by allottees other than those shown to be full bloods, or $4/4$ Indian blood, on the Government roll compiled and approved in December, 1910 (Record, pages 84-85), and printed for distribution as a Government record. Not only has Congress passed a law containing a term well known and understood by the public, and calculated to lead all persons to think that satisfactory proof of a mixture was all that was needed to bring an allottee within its terms, not only has the Indian Bureau, in the administration of this law, so interpreted it, but the *lawyers* of the Department of Justice, who directed the filing of these suits, have themselves so interpreted it, otherwise why have they not filed suits to cancel all conveyances executed by allottees shown on the Government roll to be less than half white? Their failure to do so is another reason why the judgment of the Circuit Court of Appeals should be affirmed. The making and publication of this roll, and its broadcast distribution since December, 1910, and the contemporaneous filing of all these suits, in which such roll has been largely used as a guide, together with the omission to attack any conveyances, except those claimed or shown on that roll to be $4/4$ Indian, has led honest men, honestly dealing in the sight and with the tacit consent of the representatives of the Department of Justice, to believe that the Government did not question the

operation of the Clapp Act upon those who had sufficient foreign blood and intelligence to establish themselves to the satisfaction of the Government agents. Not until the brief on behalf of the Government in these cases was filed, within the past ten days, has there been a public declaration on the part of any authorized representative of the United States, that the Clapp Act should, in the opinion of the Government, be construed to apply only to those half or more white. The trial court, with this record before him, never thought of such a thing, and the Circuit Court of Appeals, after careful thought, repudiated all contention that the act should or could be limited at all by interpretation.

And it is not necessary that it should be so limited to accomplish the ends of justice. If one who cannot be shown to have a mixture of blood to the satisfaction of the court, or of any tribunal vested with the duty of determining the fact, and who cannot establish his competency to the satisfaction of the Secretary of the Interior, has conveyed or attempted to convey his allotment, then let his conveyance or conveyances be set aside. If he is a mixed blood, within the rule established by the Circuit Court of Appeals, and he has been defrauded, let suits be brought in his name to obtain redress. The Government owes him money, which may be used to defray expenses, and the courts of Minnesota are open, honest, and effective, and mightily impatient with any conduct that looks like fraud upon these Indians. If he is such an Indian, and incompetent in fact from any cause, then put him under guardianship. Surely the probate courts of Minnesota are fully as capable as the Government has shown itself to be, during the past hundred years, of fairly and honestly caring for the property and welfare of its wards.

But do not, upon the meagre knowledge of the real situation, and the specious argument of necessity, brought forward at this late hour, after these years of misleading conduct on the part of the Government, declare that Congress

said one thing and meant another. Upon every principle of law and justice, the decision of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

RANSOM J. POWELL,
Solicitor for the Respondents,
Minneapolis, Minn.

GEORGE T. SIMPSON,
ERNEST C. CARMAN,
Minneapolis, Minn., on the Brief. ¶

